William Richardson
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June 10th, 2021

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes,

I am a rising third-year student and member of the Columbia Business Law Review at Columbia Law School. I write to apply for a clerkship in your chambers beginning in 2022.

I hope to pursue a career in litigation and aim to gain practical experience with our federal court system by serving as a clerk. Your court deals with a wide variety of interesting cases that will grant me better insight into the workings of the US Court system, which is why I decided to apply. At Columbia, I have honed my research and legal writing skills by working as a as staff member for the Business Law Review and as a teaching assistant. Currently, I serve on the Editorial Board of Business Law Review as an Articles Editor. Practically, I have improved by litigation skills through my work at the North Carolina Department of Revenue last year, and aim to further improve them through my work at the New Jersey Bureau of Securities this year. I would appreciate the opportunity to apply these skills in a clerkship position.

Enclosed please find my resume, transcript, and writing sample. Also enclosed are letters of recommendation from Judge Jed Rakoff (212-805-0479, Jed_S_Rakoff@nysd.uscourts.gov), Professor Justin McCrary (212-854-7992, jmccrary@law.columbia.edu), and Ron Williams (919-716-6089, rdwilliams@ncdoj.gov).

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Will Richardson

WILLIAM FRANK RICHARDSON

520 W 122nd St., Apt. 62A, New York, NY 10027
(919) 357-4828 • wfr2109@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. expected May 2022
Honors: Harlan Fiske Stone Scholar
Dean's Honors – Criminal Law, Spring 2020
Activities: *Columbia Business Law Review*, Staff Member
Teaching Assistant, Criminal Law, Judge Jed Rakoff (SDNY)
Columbia Virtual Entertainment Society, Co-President
Intercollegiate Poker Association, Board Member

The University of North Carolina at Chapel Hill, Chapel Hill, NC
B.A. in Political Science and Economics, with distinction and honors, received May 2017
Honors: Phi Beta Kappa
Dean's List
Honors Carolina (Honors Laureate)
Thesis: "The Impact of Conditional Cash Transfer Design on Program Corruption Rates: A Case Study of Mexico and Brazil"
Activities: UNC-Chapel Hill Mock Trial Team, Team Captain
Study Abroad: Centro Internacional De Estudios Culturales, Seville, Spain (Summer 2016)

EXPERIENCE

North Carolina Department of Justice, Revenue Section, Raleigh, NC
Legal Intern May 2020 – August 2020
Drafted and reviewed dispositive motions in multiple cases including motions for summary judgement and motions to dismiss. Conducted research for and prepared legal memoranda on questions raised in complex litigation involving the Department of Revenue (DoR), such as the impact that agency rulings can have on the common law. Drafted written discovery requests, prepared witnesses for depositions, and met with members of the DoR to discuss strategy and review responsive documents to discovery requests from opposing parties. Attended depositions related to ongoing DoR litigation. Participated in settlement discussions with client's senior staff.

Federal Home Loan Mortgage Corporation (Freddie Mac), McLean, VA
Data Analytics Professional, Condo Ops January 2019 – July 2019
Data Analytics Associate, Condo Ops July 2017 – January 2019
Managed the validation of condominium loans received by Freddie Mac. Implemented and followed condominium loan validation processes and ensured details on loans received were correct. Assisted in creating and testing the processes currently used to manually validate condominium loans. Reconciled incoming loans not already matched to a condominium project in the database and updated information as needed.

North Carolina League of Municipalities, Raleigh, NC
Intern May 2014 – July 2014
Conducted in-depth analytics on legislators in the North Carolina General Assembly. Served as the League's representative for visitors. Managed distribution of weekly newsletter to legislators. Appointed by the Legislative Counsel to write summaries of legislative sessions for the organization which directed the League's priorities.

LANGUAGES: Spanish (proficient)

Columbia
Law School

Registration Services

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CLS TRANSCRIPT (Unofficial)

05/13/2021 11:29:33

Program: Juris Doctor

William F Richardson

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6635-1	Columbia Business Law Review		0.0	
L6230-1	Corporate Taxation	D'Avino, Rick	3.0	A
L6231-2	Corporations	McCrary, Justin	4.0	A-
L6391-1	Regulation of Financial Institutions	Judge, Kathryn	3.0	A-
L9509-1	S. Antitrust in Action	Marriott, David; Varney, Christine	2.0	B+
L6822-1	Teaching Fellows	Rakoff, Jed	3.0	

Total Registered Points: 15.0

Total Earned Points: 12.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6293-1	Antitrust and Trade Regulation	McCrary, Justin	3.0	A
L6635-1	Columbia Business Law Review		0.0	CR
L6169-1	Legislation and Regulation	Merrill, Thomas W.	4.0	A
L6675-1	Major Writing Credit	Wu, Timothy	0.0	CR
L9080-1	S. Black Letter Law / White Collar Crime	Coffee, Jr., John C.; Rakoff, Jed	2.0	A-
L6683-1	Supervised Research Paper	Wu, Timothy	2.0	IN
L6320-1	Taxation of Financial Instruments	Raskolnikov, Alex	3.0	CR

Total Registered Points: 14.0

Total Earned Points: 12.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6105-1	Contracts	Scott, Robert	4.0	CR
L6108-1	Criminal Law	Rakoff, Jed	3.0	CR
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	CR
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6121-3	Legal Practice Workshop II	Bernhardt, Sophia	1.0	CR
L6116-2	Property	Heller, Michael A.	4.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-5	Legal Methods II: Transnational Law and Legal Process	Cleveland, Sarah	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Cleveland, Sarah	4.0	A
L6133-2	Constitutional Law	Hamburger, Philip	4.0	B+
L6113-4	Legal Methods	Briffault, Richard	1.0	CR
L6115-3	Legal Practice Workshop I	Bernhardt, Sophia; Newman, Mariana	2.0	P
L6118-2	Torts	Merrill, Thomas W.	4.0	B+

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 61.0

Total Earned JD Program Points: 56.0

Dean's Honors

A special category of recognition in Spring 2020 awarded to the most outstanding students in each course (top 3-5%).

Semester	Course ID	Course Name
Spring 2020	L6108-1	Criminal Law

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2019-20	Harlan Fiske Stone	1L

Seq Nbr: 1

ID: 720404894 William Richardson

Internal Unofficial Transcript - UNC Chapel Hill
2016 Phi Beta Kappa
Honors Carolina Laureate
Name : William Richardson
Student ID: 720404894
Print Date : 2017-05-20

- - - - - Degrees Awarded - - - - -

Degree : Bachelor of Arts
Confer Date : 2017-05-14
Degree Honors : Distinction
Plan : College of Arts and Sciences
Political Science Honors 1st Major
Plan : Economics
Plan : Classical Humanities
Plan : Honors Program

- - - - - Test Credits - - - - -

Test Credits Applied Toward AS Bachelor Program

2013 Fall

ENGL	110	CREDIT FOR AP ENGL LANG TEST	3.00	3.00	BE
HIST	128	AM HIST SINCE 1865	3.00	3.00	BE
LATN	203	INTERMEDIATE LATIN I		0.00	BE
LATN	203	INTERMEDIATE LATIN I	3.00	3.00	BE
LATN	204	INTERMEDIATE LATIN	3.00	3.00	BE
LATN	204	INTERMEDIATE LATIN		0.00	BE
MATH	110P	ALGEBRA		0.00	BE
MATH	110P	ALGEBRA		0.00	BE
MATH	110P	ALGEBRA		0.00	BE
MATH	129P	PRECALCULUS MATHEMATICS		0.00	BE
MATH	129P	PRECALCULUS MATHEMATICS		0.00	BE
MATH	129P	PRECALCULUS MATHEMATICS		0.00	BE
MATH	231	CALC FUNC ONE VAR I	3.00	3.00	BE
MATH	231	CALC FUNC ONE VAR I		0.00	BE
MATH	232	CAL FUNC ONE VAR II	3.00	3.00	BE
PHYS	104	GENERAL PHYSICS I	4.00	4.00	BE
POLI	100	INTRO TO GOVT IN US	3.00	3.00	BE

Test Trans GPA: 0.000 Transfer Totals : 25.00 25.00 0.000

- - - - - Academic Program History - - - - -

Program : AS Bachelor
2013-05-23 : Active in Program
2013-05-23 : Undecided Major
2013-05-23 : Honors Program Honors
Program : AS Bachelor of Arts
2015-01-07 : Active in Program
2015-01-07 : Undecided Major

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                2015-01-07 : Honors Program Honors
2015-04-09  :   Active in Program
                2015-04-09 : Political Science Major
                2015-04-09 : Classical Humanities Minor Minor
                2015-04-09 : Honors Program Honors
2017-01-19  :   Active in Program
                2017-01-19 : Political Science Major
                2017-01-19 : Economics Second Major
                2017-01-19 : Classical Humanities Minor Minor
                2017-01-19 : Honors Program Honors

              - - - - -   Beginning of Undergraduate Record   - - - - -
                                      2013 Fall
CLAS        71H      FYS: ARCH OF EMPIRE                3.00     3.00 A-      11.100
ENGL       105I      ENG COMP/RHET (INTERDISC)          3.00     3.00 A       12.000
LFIT       113       LIFE FITNESS: WEIGHT TR            1.00     1.00 A-       3.700
POLI       276H      MAJ ISS POL THEORY                 3.00     3.00 B+       9.900
SPAN       105       SPAN FOR HIGH BEGINNERS            4.00     4.00 A       16.000
STOR       113       DEC MODELS FOR ECON                3.00     3.00 A       12.000
         TERM GPA :     3.806      TERM TOTALS :     17.00    17.00          64.700

         CUM  GPA :     3.806      CUM  TOTALS :     17.00    42.00          64.700
                    Dean's List
                    Good Standing

                                      2014 Spr
ECON       101       ECON: INTRO                        3.00     3.00 A-      11.100
HNRS       355       LITERARY ARTS                      3.00     3.00 A       12.000
     Course Topic(s): BORDERS/WALLS IN THE ARAB WRLD
MATH       233       MULTI VARI CALC I                  3.00     3.00 A       12.000
POLI       150       INTERN REL WRLD POL                3.00     3.00 A       12.000
SPAN       203       INTERMEDIATE SPANISH I             3.00     3.00 A       12.000
         TERM GPA :     3.940      TERM TOTALS :     15.00    15.00          59.100

         CUM  GPA :     3.869      CUM  TOTALS :     32.00    57.00         123.800
                    Dean's List
                    Good Standing

                                      2014 Fall
CLAS       415H      ROMAN LAW                          3.00     3.00 A-      11.100
ENGL       320       CHAUCER                            3.00     3.00 A-      11.100
PLCY       101H      MAKING PUBLIC POLICY               3.00     3.00 A       12.000
POLI       130       INTRO TO COMP POLI                 3.00     3.00 A-      11.100
SPAN       204       INTERMEDIATE SPANISH II            3.00     3.00 PS
         TERM GPA :     3.775      TERM TOTALS :     15.00    15.00          45.300

         CUM  GPA :     3.843      CUM  TOTALS :     47.00    72.00         169.100
                    Dean's List
                    Good Standing
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2015 Spr

CLAS	131	CLASSICAL MYTHOLOGY	3.00	3.00	A-	11.100
ECON	400H	ELEM STATISTICS	3.00	3.00	B	9.000
ECON	410H	MICRO THEORY	3.00	3.00	A-	11.100
POLI	238	CONT LAT AM POLI	3.00	3.00	A-	11.100
SPAN	260	INTR SPAN/SP AM LIT	3.00	3.00	B+	9.900
	TERM GPA : 3.480	TERM TOTALS :	15.00	15.00		52.200
	CUM GPA : 3.751	CUM TOTALS :	62.00	87.00		221.300
	Good Standing					

2015 Sum I

PSYC	101	GENERAL PSYCHOLOGY	3.00	3.00	A-	11.100
	TERM GPA : 3.700	TERM TOTALS :	3.00	3.00		11.100
	CUM GPA : 3.748	CUM TOTALS :	65.00	90.00		232.400
	Good Standing					

2015 Fall

CLAS	122	THE ROMANS	3.00	3.00	A-	11.100
ECON	511H	GAME THEORY	3.00	3.00	A-	11.100
POLI	433H	EUROPEAN UNION	3.00	3.00	A	12.000
SPAN	255	CONVERSATION I	3.00	3.00	A	12.000
	TERM GPA : 3.850	TERM TOTALS :	12.00	12.00		46.200
	CUM GPA : 3.765	CUM TOTALS :	77.00	102.00		278.600
	Dean's List					
	Good Standing					

2016 Spr

CLAR	247	Roman Archaeology	3.00	3.00	B+	9.900
ECON	420	IN TH/MONEY INC EMP	3.00	3.00	A	12.000
ECON	460	INTERNATIONAL ECON	3.00	3.00	A-	11.100
POLI	420H	LEGISLATIVE POLITICS	3.00	3.00	A-	11.100
POLI	691H	HNRS SEM RES DESIGN	3.00	3.00	A-	11.100
	TERM GPA : 3.680	TERM TOTALS :	15.00	15.00		55.200
	CUM GPA : 3.751	CUM TOTALS :	92.00	117.00		333.800
	Dean's List					
	Good Standing					

2016 Sum I

TREQ	289	ELECTIVE	3.00	3.00	PS	
TREQ	289	ELECTIVE	3.00	3.00	PS	
YAP	302	STDY IN SPAIN		0.00	NE	
	TERM GPA : 0.000	TERM TOTALS :	6.00	6.00		0.000
	CUM GPA : 3.751	CUM TOTALS :	98.00	123.00		333.800
	Good Standing					

		2016 Fall				
ECON	510H	ADV MICRO THEORY	3.00	3.00	A	12.000
MUSC	145	INTRO TO JAZZ	3.00	3.00	A	12.000
PHIL	155	INTRO MATH LOGIC	3.00	3.00	A	12.000
POLI	692H	HONORS RESEARCH	3.00	3.00	A	12.000
	TERM GPA :	4.000 TERM TOTALS :	12.00	12.00		48.000
	CUM GPA :	3.780 CUM TOTALS :	110.00	135.00		381.800
		Dean's List				
		Good Standing				
		2017 Spr				
COMP	116	INTRO SCIENTIFIC PROG	3.00	3.00	A	12.000
ECON	480	LABOR ECONOMICS	3.00	3.00	A-	11.100
ECON	570H	APPLIED ECONOMETRIC ANALYSIS	3.00	3.00	C	6.000
POLI	693H	HONORS THESIS RESEARCH	3.00	3.00	A	12.000
	TERM GPA :	3.425 TERM TOTALS :	12.00	12.00		41.100
	CUM GPA :	3.742 CUM TOTALS :	122.00	147.00		422.900
		Good Standing				

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

This letter is written in my capacity as Paul J. Evanson Professor of Law at Columbia Law School to highly recommend Will Richardson for a position as your law clerk. I've come to know Will through his outstanding work in two of the classes I teach and have been routinely impressed by his intellect and character. I have no doubt that you will be too.

I first met Will as a student in my Antitrust course during the Fall of 2020. Although this class had to be taught online, Will had no problem adjusting to the new class format and quickly became one of my most active students. Will showed excellent understanding of the material, superb analytical skills, and was able to easily describe this material to others in the class. I was particularly impressed by his ability to quickly grasp and apply complex economic concepts, a rare skill that is absolutely indispensable in understanding antitrust law. His capacity to work at the intersection of law and economics is a truly unique asset that sets Will apart from the crowd. Will also showed great interest in the material, consistently attending my office hours to discuss the application of class material to contemporary legal issues and ask for feedback on his writing. It came as no surprise to me that at the end of the semester he was one of the students to receive an "A" in what was a very competitive class. On the final exam, his strong and concise writing skills helped him to stand out from the rest of the class, and I have no doubt his legal writing will serve him well as a clerk. I selected him as one of my Teaching Assistants for Antitrust next year, and look forward to having him assist mentoring other students on these same issues.

Will was also a student in my Corporations course during the Spring semester. Although the class was quite large, Will once again distinguished himself among the other students as someone who was quickly able to understand and explain complex legal concepts and their relationship to economic realities. He ultimately received a very strong "A-" in the course. Even though Corporations addressed complex legal issues such as agency law and the multitude of sometimes contradictory fiduciary duties officers owe to a corporation, Will demonstrated a deft ability to navigate and interpret these relationships within a clear legal framework. I am confident that this ability would serve him well as a clerk for any judge.

In sum, in the two courses Will has taken with me, he has shown superior analytical skills, and demonstrated not only an ability to grasp complex topics, but also an ability to clearly explain them orally to other students, and in writing on the exams. I look forward to having Will serve as a TA for me next year, and believe that his easygoing and affable personality will make him approachable for other students. I wholeheartedly recommend Will as a clerk, and look forward to seeing what he will do in the years ahead. He would be an outstanding hire. Please do not hesitate to contact me if you would like to speak in greater detail about Will's application.

Yours Truly,

Justin McCrary

Justin McCrary - jrm54@columbia.edu

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

This letter is written in my capacity as a very long-time Adjunct Professor at Columbia Law to highly recommend Will Richardson for a position as your law clerk. As detailed below, Will has all the qualities to be a great law clerk, and my only regret is that my strict policy against offering a clerkship to anyone who has served as my teaching assistant prevents me from considering him for myself.

Will first came to my attention in the Spring of last year, when he was a student in the basic first year Criminal Law course that I teach at Columbia. Although, because of the pandemic, all courses that semester were taught on a "Credit/No Credit" basis, the professors were authorized to award "Dean Honors" to the top five students in each class. While there were a great many bright people among the nearly 100 students in my Criminal Law class, and while the final exams were blindly graded, I was not surprised when it turned out that one of the top five was Will, since he had already shown in class that he had a brilliant analytic mind. Accordingly, I asked him to be my teaching assistant for the Spring semester of this year.

Meanwhile, however, Will took this past Fall a seminar I coteach with Prof. Jack Coffee on "The Black Letter Law of White Collar Crime." This is a highly competitive seminar taken by among the very best upperclass students at the law school, but once again Will stood out. His final paper, which proposed a new statute to deal with the many difficulties presented by the "honest services" prong of mail fraud, was a model of clear thinking and creative thought, not to mention exceptionally good writing, and his very good grade of A- does not really do total justice to what an outstanding student he was.

Finally, as noted, Will served as one of my four teaching assistants this past semester, and yet once again showed the breadth and depth of his talents. Among other things, I have my teaching assistants provide weekly review sessions for the students, and the students were unanimous in their praise for Will's clarity of presentation, turning even the most complicated doctrines into straightforward and accessible ideas.

Will is also an extremely likeable and highly mature young person, with a broad range of interests and talents, and a genuine commitment to serving others. I hope you will give his clerkship application your most serious consideration.

Yours Truly,

Jed S. Rakoff

Jed Rakoff - Jed_S_Rakoff@nysd.uscourts.gov

William Frank Richardson
520 W 122nd St Apt. 62A, New York, NY 10027
919-357-4828 • wfr2109@columbia.edu

The following writing sample comes from the note that I prepared for the Columbia Business Law Journal. This note examines novel antitrust tying concerns in the tech industry. Specifically, it examines the difficultly of applying traditional tying standards as outlined in cases such as *Jefferson Parrish* and *US v. Microsoft* to hardware and software products which are created by the same company. This note outlines problems that have arisen under the current, rule of reason focused standard, and suggests a new method for courts to examine these sorts of bundles.

Analysis of Tied Online Marketplaces: A Potential Return to a Modified Per Se Standard

William Richardson

Introduction:

Antitrust law is divided between two different categories of rules: "Per Se" rules and the "Rule of Reason." "Per Se" rules are typically bright line standards which if, if crossed, result in an automatic finding that an antitrust violation occurred[1]. The "Rule of Reason", by contrast, weighs the possible anticompetitive nature of an action against the possible benefits it would bring to consumers in the market[2].

Courts have long struggled to apply traditional antitrust rules to newer and ever-evolving technologies. While per se rules can provide easier guidelines for courts to follow, and give potential entrepreneurs a clear warning as to when they may get in trouble with the law, many judges have worried that conduct illegal in traditional markets may lead to efficiencies in technology markets.[3] Market efficiencies are particularly likely to result in technology markets because many types of technological products can be linked together and compliment one other[4]. As a result, when it comes to technological markets, many courts have applied the rule of reason even to behavior traditionally governed by per se standards.[5] The rule regarding "tying" is one particular example.

[1] Donald L. Beschle, What, Never Well, Hardly Ever: Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality, 38 Hastings L.J. 471, 472 (1987).
[2] *Id*. at 471-472
[3] *See United States v. Microsoft Corp*., 253 F.3d 34, 84 (D.C. Cir. 2001) (Discussing that rule of reason should be applied rather than per se due to the "newness" of the market)
[4] Melissa Hamilton, Software Tying Arrangements under the Antitrust Laws: A More Flexible Approach, 71 DENV. U. L. REV. 607, 608-609 (1994) (Discussing the usefulness to software ties to tech companies).
[5] Microsoft, 253 F.3d at 84, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 468 (7th Cir. 2020); Christian Ahlborn, David S Evans, A. Jorge Padilla, *The Antitrust Economics of Tying: a Farewell to Per Se Illegality*, 49 ANTITRUST BULLETIN 287, 290-291 (2004)

This Note argues for a reexamination of the standards used to examine software ties through the scope of online markets. Part I explains the antitrust doctrine surrounding "tying" and the legal standards applicable in the market for software. Part II investigates the advantages and disadvantages of employing a relaxed "rule of reason" standard for software ties, focusing particularly on issues arising from restricted marketplaces for software on smartphones and gaming consoles. Finally, Part III argues that Courts should return to a modified version of the Jefferson Parish standard for tied markets, albeit with terminology more in line with what developers actually use.

Part I: Tying in Technology Markets

This section examines the traditional standards used in antitrust law to determine illegal ties. It will first describe exactly what an illegal tie is and how illegal ties are determined under the *Jefferson Parish* standard. It discuss how the standard used to determine a tie changed after *U.S. v. Microsoft* from "Per Se" illegality to the "Rule of Reason". Finally, it will discuss the impact that this change has had.

A. What is a Tie?

Tying refers to a specific type of behavior wherein a seller of one product uses their power in that market to force buyers to purchase or use another specific product.[6] This type of behavior is ubiquitous and not inherently anticompetitive.[7] In fact, in many cases tying products can actually help consumers by allowing companies to work together efficiently and sell more complete

[6] *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958) (Defining a tie as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier)
[7] US DOJ, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 111-12 (2004)

products.[8] A car made by the Honda Corporation, for example, can be sold with tires made by Michelin already installed on the car[9], and Microsoft Word comes preinstalled with automatic spellchecking software[10]. While all of these products could be sold separately, consumers often find it easier to buy these products bundled together as they are logically linked with one another; thus allowing seller to link them together can create market efficiencies.[11]

It is illegal, however, for firms to use their dominant market power to force a tie and cause consumers to buy a product available in a separate market.[12] For example, the FTC recently brought a case against the manufacturer of a schizophrenia drug who required purchasers of the drug to also use their blood monitoring system.[13] Although blood monitoring could be seen as related to the health of patients using the drugs, blood monitoring services could be provided by many alternative companies in the market. Courts determined it was unfair for the drug manufacturer to leverage their monopoly over the drug into an advantage in another market.[14]

In most markets, tying is governed by a per se rule.[15] In other words, illegally tied products are considered per se anticompetitive—regardless of any efficiencies created by the tie.[16] As a result, many tying cases tend to focus on whether two products are truly separate or whether a

[8] Joshua S. Gans, Remedies for Tying in Computer Applications, 29 International J. Industrial Organization 505, 506 (2011) (Stating how tied products can produce efficiencies for consumers)
[9] Michelin, *Tires by Cars and Brands: Honda*, https://www.michelinman.com/Honda.html (Last Visited Feb. 16, 2021)
[10] *Check grammar, spelling, and more in Word*, Microsoft Support, https://support.microsoft.com/en-us/office/check-grammar-spelling-and-more-in-word-0f43bf32-ccde-40c5-b16a-c6a282c0d251 (Last Visited Feb 16, 2021)
[11] *Gans, 506*. (Stating how tied products can produce efficiencies for consumers)
[12] Guide to Antitrust Laws, *Tying the Sale of Two Products*, The Federal Trade Commission, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products (Last Visited: Nov. 23, 2020)
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Tyler A. Baker, The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot, 66 VA L. Rev. 1235, 1238 (1980)

firm actually has enough power in a market to force a tie.[17] The case that lays out the standards used to determine whether a product bundle constitutes an illegal tie is *Jefferson Parrish*.[18]

i. The *Jefferson Parish* Standard

In *Jefferson Parish*, the Supreme Court ruled that "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact".[19] Essentially, for an illegal tie to exist, there must be evidence that a firm has enough power in a market to force consumers to buy a separate product.[20] The standard used by the Court in *Jefferson Parish* outlined two steps courts had to follow when attempting to determine whether a tie occurred.

First, a court must determine that the products being sold constitute separate markets.[21] To make this determination, one can examine whether the two products are purchased together or separately and whether consumers prefer to make their own choices about which products to buy in order to make determination that an illegal tie exists.[22] *Jefferson Parish* also held that two products could fall within "distinct markets" even if one is not commonly bought without the other.[23] For example, the court in *Jefferson Parish* dealt with a tie of anesthetics and surgical operations. Even though anesthetics are not sold in a non-surgical context and surgeons often

[17] For a discussion on how the separate products test has developed and been put in use in courts, *see* Albhorn, *supra* note 5 at 287
[18] *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 18, 104 S. Ct. 1551, 1561, 80 L. Ed. 2d 2 (1984), *abrogated by* Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)
[19] *Jefferson Par.*, 104 S. Ct. at 1561
[20] *Id.*
[21] *Id*. at 1562-1563
[22] *Id*. at 1563
[23] *Id*. at 1562

need anesthetics to operate, the court held the products were still distinct enough to constitute "separate markets" in the context of a tie.[24]

If a determination is made that the two products are sold in "separate markets, the court must then determine if one business is using their "market power" to force the tie, or if the bundling stems from a natural efficiency desired by consumers.[25] As an example, the court in Jefferson Parish held that even though anesthetics and surgeries occupied "separate markets", there was no forced tie.[26] The court reasoned that patients undergoing surgery preferred to have anesthetics ready, and considered most anesthetic services to be interchangeable.[27]

When it comes to software, however, the standard is different. The interconnectedness of software products has made courts reluctant to declare certain product bundles to be illegal ties, particularly when connections can lead to more efficiencies for consumers[28]. Many types of software complement one another and make programs run more efficiently; indeed, software ties between certain products have become almost essential to actually attract customers. For example, most consumers would prefer to buy a computer with an OS, Microsoft Office, or some sort of web browser pre-installed over having to buy and install each product separately[29]. This interactivity, combined with the relative newness of these markets, have made it difficult for courts to draw hard lines as to what should constitute an illegal tie.

ii. The *Microsoft* Standard

[24] *Jefferson Par.*, 104 S. Ct. at 1563-64
[25] *Id.* at 1566
[26] *Id*
[27] *Id.*
[28] *See, e.g.,* In re: Cox Enterprises, Inc., 871 F.3d 1093, 1102 (10th Cir. 2017); United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001).
[29] Rajiv M. Dewan, Consumers Prefer Bundled Add-Ins, 20 J. Management Information Systems 99, 101 (2003)

The seminal case for determining whether an illegal software tie occurred is *United States v. Microsoft*. The court in *Microsoft* generally upheld *Jefferson Parish*'s standard for defining different markets, ruling that a physical product such as computer hardware does constitute a separate market from the software pre-installed on it.[30] The court also indicated that there could be tying issues when a corporation bundles together or forcibly includes software they develop on hardware they also develop.[31] Where the court differed from *Jefferson Parish*, however, was in the application of a per se standard. The court in *Microsoft* believed that the bundling of Windows OS and Internet Explorer could violate tying rules under the traditional separate products test outlined in *Jefferson Parish*. However, they declined to apply a Per Se analysis to the tie, instead stating that the Rule of Reason should apply instead

The court gave two reasons for the switch. First, they were concerned about applying per se rules to an entirely new market. At the time, the computer and technology industry in general was extremely new, and were worried about unintended consequences of applying traditional antitrust rules to the market. Second, the court was worried about the fact that this market was new would mean that the court would not be able to apply appropriate standards to the facts on the ground. [32] As a result, they declined to extend the typical per se rule as to what constituted an illegal tie and instead suggested that the "rule of reason" should apply to the facts of the case.[33] This meant that allegations of illegal software ties should be dealt with on a case-by-case basis, with the court weighing the efficiency of the tie and its benefit to consumers against its anticompetitive aspects and potential harms.[34]

[30] *Microsoft*, 253 F.3d at 88, 89
[31] *Id*. at 85, 86
[32] *Id*.
[33] *Id*. at 84
[34] *Id*.

B. The Application of the Microsoft Standard

Software ties exist on a spectrum. Personal computers (PCs) and internet browsing software, for instance, are widely understood as constituting two separate products or markets. The physical clicker and software for opening garage doors, on the other hand, are generally seen as making up a single product or market. Applying the Microsoft standard to each of these relatively clear-cut examples shows what courts look for when identifying a "separate market" and evaluating the potential efficiencies of an inter-market tie.

At one end of the spectrum, we have personal computers, or PCs[35]. In the modern era, personal computers have become practically commonplace[36] and serve a variety of functions.[37] Suffice to say, computers give their users an opportunity to partake and interact with a whole host of different activities and markets[38]. It is because of this reach that one can see a number of different developers building software and apps for both Apple and Microsoft PCs, rather than just the company itself[39]. No company would have the resources to innovate and create all of this

[35] Editors of Encyclopaedia Britannica, *Personal computer*, Encyclopedia Britannica, https://www.britannica.com/technology/personal-computer (Last Accessed Feb. 16, 2021)
[36] US Census Bureau, ACS-39 , *Computer and Internet Use in the United States: 2016* 1 (2018) (Stating that 89% of households in the US own some form of personal computer, and 81% had a broadband internet subscription)
[37] One could use a computer not only to complete basic tasks such as checking the time, playing or streaming videos, or shopping for specific online products, but also use them to connect with others through social media, get in touch with potential customers, and gain access to a whole host of services that one would not be able to use otherwise. *Id*.
[38] Blake Morgan, *More Customers Are Shopping Online Now Than At Height Of Pandemic, Fueling Need For Digital Transformation*, Forbes (July 7, 2020), https://www.forbes.com/sites/blakemorgan/2020/07/27/more-customers-are-shopping-online-now-than-at-height-of-pandemic-fueling-need-for-digital-transformation/?sh=549a38176bb9 (Discussing recent growth of online markets, even as pandemic stores begin to re-open)
[39] C. A. McCall-Peat, *Management of 3rd party software development suppliers*, Project Management Institute (Jan. 31, 2007), https://www.pmi.org/learning/library/third-party-software-outsourcing-projects-7353. (Discussing the benefits and drawbacks of 3rd party software development); PIERCE AND DAVID WOODBRIDGE, THE BUSINESS OF IOS APP DEVELOPMENT, 2 (2014) (Discussing the huge number of apps available and the success of the app store)

software on its own, and consumers benefit from having a competitive and diverse array of software available on their PCs[40].

A rule of reason inquiry looks at these underlying economics, and allows the court to more easily reach a conclusion that Windows OS and Internet Explorer could be used separately. Due to the difficulty and resulting unlikelihood that one company would be able to develop all of these products, the court in *Microsoft* concluded that Internet Explorer and other basic software products constituted a "separate product" from the PC or operating system itself.[41]

While software installed on PCs serve as an example of a product for which software may be an obvious tie, there also exist a number of products for which calling a piece of software for a physical product a "separate market" would make little sense at all. For example, let's look at a product like a garage door opener[42]. A garage door opener serves exactly one purpose: to open a specific garage door. It has no connection to the internet, a limited range, and an extremely limited scope of use[43]. At the same time, it does have simple software installed on it to actually make the product work[44].

Under a traditional "separate products" test, one could try to make an argument that this software constitutes a "separate product market" from the physical opener itself. This argument would be much less likely to succeed with the full economic analysis under the rule of reason, however. The technology making a garage door opener work is an essential part of the product:

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[40] *Id*.
[41] United States v. Microsoft Corp., 253 F.3d 34, 89–90 (D.C. Cir. 2001)
[42] For some examples, see *Types of Garage Door Openers*, HOME DEPOT (Last Accessed Feb 17, 2021) https://www.homedepot.com/c/ab/types-of-garage-door-openers/9ba683603be9fa5395fab90ff47247c.
[43] *Id*. (Describing some of the limited uses and functions of a garage door opener)
[44] *The Electric Garage Door Opener: Understanding How It Works*, Ram DOORS (Sept. 28, 2018) https://www.ramdoors.ca/ca/blog/electric-garage-door-opener-understanding-works (Discussing how a remote opens a garage door)

without it, consumers would simply have an expensive clicker[45]. Nor would it make much sense to force sellers to compete in a theoretical "garage door software" market. Software making garage door openers work is going to be functionally similar[46], and it is unlikely that consumers are going to want their garage door operating software bundled separately, if ever, from their garage door ever opening. As a result, even though theoretically one could view garage door openers as a "separate product" from the physical product, functionally they act as one, intertwined device.

The above analysis poses an interesting problem which helps explain why courts chose to apply something like the "Rule of Reason" in the Microsoft case. Although software clearly constitutes a separate product market for some technological products, in others it could be seen as an essential part of the same product. Rather than requiring courts to puzzle out exactly when two products actually constitute a separate market for antitrust purposes, the court in Microsoft instead applied a more lenient rule of reason standard rather than the stricter Per Se ruled used under *Jefferson Parish*.[47]

C. The Impact of Microsoft on Software Ties

This rule of reason analysis has been applied by courts consistently across the country since the *Microsoft* case[48]. The rule of reason tends to be fairly defendant friendly,[49] allowing tech developers to bundle products together without significant concern that they would be prosecuted

[45] *Id*.
[46] *Id*.(Discussing development of radio waves for garage door openers).
[47] Microsoft Corp., 253 F.3d at 94
[48] For examples other cases utilizing the 'Rule of Reason' with technology markets based on *Microsoft*, *see* Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020); In re: Cox Enterprises, Inc., 871 F.3d 1093, 1103 (10th Cir. 2017).
[49] Donald L. Beschle, *supra* note 1 at 473-475 (discussing how Rule of Reason is generally seen as more lenient and defendant friendly than per se rules).

for an antitrust violation. This has allowed entrepreneurs and tech companies to create linked hardware and software products without significant worry that they would later be sued for an antitrust violation.[50] The adoption of this standard has coincided with the development of a whole host of products beyond computers. Examples abound: iPhones are tied with software products like the iOS operating system and the Apple Store[51]; Amazon Echo Dots come exclusively with Alexa[52]; and gaming consoles come with marketplaces and software pre-designed by their parent companies.[53] The ability for companies to create products like these has been a net positive for consumers, and it is good that antitrust law did not deter these types of tied products.[54]

At the same time, there is some concern that in attempting to protect innovation with a malleable, ex post standard—as opposed to a per se rule—courts have overcorrected and allowed potentially anti-competitive abuses to slip through the cracks.[55] Recent antitrust literature has been concerned with the dominance and consolidation that some firms have had over aspects of the technology market[56]. For example, the smartphone market is dominated by Apple and Google, who combined control an estimated 99% of the market[57]. To a lesser extent, online retail market is dominated by Amazon, which currently controls 23.1% of online shopping and

[50] *See* Christian Ahlborn, David S Evans, A. Jorge Padilla, *The Antitrust Economics of Tying: a Farewell to Per Se Illegality*, 49 ANTITRUST BULLETIN 287, 337-39 (2004)
[51] *No Title*, APPLE SUPPORT (Feb. 3, 2021), https://support.apple.com/en-us/HT201685
[52] *Echo Dot (2nd Generation) - Smart speaker with Alexa*, AMAZON (Last Accessed Feb. 17, 2021), https://www.amazon.com/Amazon-Echo-Dot-Portable-Bluetooth-Speaker-with-Alexa-Black/dp/B01DFKC2SO
[53] *About PlayStation™ Store*, PLAYSTATION (Last Accessed Feb. 17, 2021), https://www.playstation.com/en-us/about-playstation-store/
[54] Josh Baskin, Competitive Regulation of Mobile Software Systems: Promoting Innovation through Reform of Antitrust and Patent Laws, 64 Hastings L.J. 1727, 1735-36 (2013)
[55] *See* SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE OF THE JUDICIARY, 116TH CONGRESS, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 3 (2020), Joshua S. Gans, Remedies of Tying in Computer Applications, 29 INT. J INDUSTRIAL ORGANIZATION 505 (2011) (discussing how some trying remedies are ineffective)
[56] Lina Khan, Amazon's Antitrust Paradox, 126 Yale L J 564, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS
[57] Mobile Operating System Market Share Worldwide, Stat Counter, https://gs.statcounter.com/os-market-share/mobile/worldwide (Last Accessed Nov. 23, 2020)

shipping sales[58]. Concerns have been growing that these firms have been able to abuse their power in established markets to branch out or control other ones, sometimes using tied products as a way to do so. While there are multiple markets that the literature has been concerned about, this note will focus on one specific type of tie – a tie between a physical product and online marketplaces.

Part II: The Current State of Restricted Markets

This section of the note looks at the current state of restricted online marketplaces. It first examines a couple of markets which restrict what stores a user can access and explains why a company may choose to implement such restrictions. It then looks at some of the concerns and controversies surrounding these restrictions, and why the current tying standard as applied to them is problematic. Finally, it gives a brief overview of potential changes to the status quo.

A. Online Marketplaces and Software Tying

i. Online Marketplaces

In today's digital age, online marketplaces have become practically ubiquitous. Although Amazon dominates the online shipping industry, there are a number of smaller online marketplaces that consumers can use to shop for specific products[59]. Most of these online marketplaces are easily accessible on open products like a PC, and have made it much easier for consumers to find and purchase the products they are looking for.

These smaller marketplaces have been a massive boon for vendors and distributors of these goods as well. Not only do they make it easier for consumers to find the products they are

[58] Don Davis, *Amazon's share of US online retail revenue dips slightly in Q3*, Digital Commerce, Nov. 3, 2020.
[59] *See*, for example, NEWEGG (Last Accessed Feb. 17, 2021), https://www.newegg.com/; ETSY (Last Accessed Feb. 17, 2021), https://www.etsy.com/; WALMART (Last Accessed Feb. 17, 2021), https://www.walmart.com/, and many other retailers.

looking for, they also offer a platform for vendors to advertise and distribute their products to potential buyers[60]. Nowadays, many retailers would find it hard to imagine not selling on online marketplaces without taking a significant hit to their business.[61]

Online marketplaces are particularly critical to software developers and distributors. These online stores can offer a plethora of software for users to download and install. Whereas traditional stores and offerings required customers to follow detailed and sometimes complicated instructions for how to download and use software, many of these online marketplaces make software accessible through just a click of a button.[62] The software available in online markets range from largely functional tools such as Microsoft Office[63] and SAS,[64] to more recreational applications such as games[65] or an adblocker[66]. Needless to say, access to these stores where one is able to sell software is often times a critical part of getting software sold to consumers.[67]

ii. Restricted Marketplaces

[60] Rohm, A. J., Kashyap, V., Brashear, T. G., & Milne, G. R., *The use of online marketplaces for competitive advantage: A Latin American perspective*. 19 J BUS. INDUSTRIAL MARKETING 372, 373 (2004).
[61] *Id*.
[62] *Buying software online: did you really get what you paid for?*, MICROSOFT (Oct. 20, 2020), https://news.microsoft.com/en-cee/2020/10/20/buying-software-online-did-you-really-get-what-you-paid-for/ (Discussing ease of buying software online while providing warnings against using certain "sketchy" site)
[63] Choose the right Microsoft 365 for you, MICROSOFT (Last Accessed Feb. 17, 2021), https://www.microsoft.com/en-us/microsoft-365/buy/microsoft-365
[64] SAS (Last Accessed Feb. 17, 2021), https://www.sas.com/en_us/software/how-to-buy.html
[65] MICROSOFT STORE (Last Accessed Feb. 17, 2021), https://www.microsoft.com/en-us/store/games/windows
[66] *Adblocker for Chrome,* CHROME WEB STORE (Last Accessed Feb. 17, 2021), https://chrome.google.com/webstore/detail/adblocker-for-chrome-noad/alplpnakfeabeiebipdmaenpmbgknjce?hl=en-US
[67] Andrada Fiscutean, *Why Are Physical Software Sales Still a Thing?*, VICE (Feb. 11, 2017), https://www.vice.com/en/article/pgm7pz/why-are-physical-software-sales-still-a-thing (Stating only 30% of software sales even for popular software are made physically); *Breakdown of U.S. computer and video game sales from 2009 to 2017, by delivery format*, STATISTA (Last Accessed Feb. 19, 2021) https://www.statista.com/statistics/190225/digital-and-physical-game-sales-in-the-us-since-2009/ (Showing 83% of computer and video game sales are now made online, up from only 20% in 2009)

While many online marketplaces are readily accessible using ordinary digital devices, some devices restrict their users' access to certain online markets,[68] requiring consumers to use the manufacturer's marketplace of choice. For example, the iPhone only allows consumers access to a single app store to download applications on to a phone. Gaming consoles similarly only allow a consumer to purchase software and applications through a storefront provided by the console creator.

Developers who put these restrictions in place can have reasons to do with which are not anticompetitive. First, and most generally, a limited storefront can make sense for a device whose purposes are similarly limited in scope. Devices like a garage door opener or a gaming console do not have quite as many functions as a full PC. A device like an AppleTV, for example, has the brunt of its features focused on streaming.[69] When a device has such limited functionality, it can make some intuitive sense for the software available on it to be similarly restricted.

Another reason that developers place restrictions on these types of marketplaces is so that they have a greater ability to control the software available on them. This is done partially to prevent users of the product from potentially downloading any sort of malicious software. Oftentimes, the storefronts available on these kinds of devices offer a highly curated assortment of the applications available[70]. This curation and check for potential security breaches are done

[68] For example, consumers can only download Apps on the App Store while on iPhone, but can choose from a number of options while on PC; Timothy Lee, *Apple's app store is an illegal monopoly, rival Cydia claims in suit*, ARS TECHNICA (Dec. 11, 2020), https://arstechnica.com/tech-policy/2020/12/apples-app-store-is-an-illegal-monopoly-rival-cydia-claims-in-suit/

[69] Lauren Goode, *Too Embarrassed to Ask: What Is Apple TV, Anyway?*, VOX RECODE (Mar. 27, 2015), https://www.vox.com/2015/3/27/11560732/too-embarrassed-to-ask-what-is-apple-tv-anyway)

[70] Paul Boutin, *The secret world of apps: Apple's approval process is a long and often convoluted journey for developers intent on being in the storied Itunes store--and that's the way that Steve Jobs likes it*, ADWEEK (May 23, 2011); *App Review*, APPLE (Last Accessed Feb. 17, 2021), https://developer.apple.com/app-store/review/; *Launch*

to make sure that an application available for download by a user is not malicious in addition to making sure an app meets basic quality of life standards[71].

If users had access to a variety of storefronts, they may be able to use one that does not check applications before making them available for download. This could render the devices' users particularly susceptible to all kinds of security breaches or problems which could make their device undesirable[72]. While device manufacturers may not be directly associated with these alternative storefronts, they could still face user complaints if their devices somehow got hacked or if security breaches compromised the greater app ecosystem[73]. In this context, limiting the market in some way could be seen as a necessary evil in order for these companies to protect the reputation of their brand.

B. Potential Antitrust Issues:

Even though there are valid business reasons for console developers to want to restrict user access to online markets, there have been concerns about whether these types of market restrictions in fact allow cover for unfair, anticompetitive behavior.[74] One of the largest goals of antitrust law is to facilitate fair competition within the marketplace in order to produce market optimal outcomes, and benefit overall consumer welfare.[75] Restricting control of online markets,

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Checklist, ANDROID (Last Accessed Feb. 17, 2021), https://developer.android.com/distribute/best-practices/launch/launch-checklist

[71] John Bergmayer, *Tending the Garden: How to Ensure That App Stores Put Users First*. PUBLIC KNOWLEDGE, 16-17 (June 2020), https://www.publicknowledge.org/wp-content/uploads/2020/06/Tending_the_Garden.pdf

[72] *Id*. at 17

[73] *Id*. at 34; Michael Gartenber, *App store accountability: quality matters more than quantity, and that means we have to accept curation,* 29 MACWORLD 96 (2012)

[74] *SCOTUS seems open to allowing Apple App Store antitrust suit, Reuters says*, THE FLY (26 Nov. 2018), https://link.gale.com/apps/doc/A563398644/ITOF?u=columbiau&sid=ITOF&xid=4ffbe8a8; Katie Collins, *EU targets Apple Pay, App Store with antitrust investigations*, CNET (June 16, 2020), https://www.cnet.com/news/eu-opens-antitrust-investigations-into-apple-pay-and-the-app-store/

[75] *The Antitrust Laws*, FEDERAL TRADE COMMISSION (Last Accessed Feb. 19, 2021), https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (Stating "...antitrust laws have had the same

even in the context of these limited products, brings with it some concerns that these firms will abuse their power in order to turn a profit.

i. Commission Fee Charges

Many online stores require developers attempting to sell their products through them to pay a commission fee to the store owner. While this sort of charge is commonplace in online stores, restricting availability of stores on some devices may allow those stores to charge monopoly rates. Stores like the Apple App Store charge a commission fee of 30% (recently and temporarily reduced to 20%) not only on the sale of any app purchased through the AppStore, but also on any "in-app" purchases made while using the App itself.[76] Stores on gaming consoles charge a similar fee for purchases of apps through their respective marketplaces[77]. These companies claim that they are simply charging a fair market rate for use of their online marketplaces, and point to other online stores with similar pricing as evidence that their behavior is not abnormal and in fact relatively in line with what the market requires.[78] For example, Steam, an online app marketplace available on PC which has to compete with other online storefronts charges a similar 30% commission for sales through their store.[79]

Developers and potential competitors have claimed, however, that these commission rates are well above a fair market price.[80] These competitors claim that these market owners can get away

basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up")

[76] Kif Leswing, *Apple makes another concession on App Store fees*, CNBC (Nov. 23, 2020), https://www.cnbc.com/2020/11/23/apple-extends-fee-waiver-for-digital-classes-in-app-store-.html

[77] Hayley Williams, *The 30% Fee Epic Is Fighting Apple Over Began With Nintendo*, GAMESPOT (August 25, 2020), https://www.gamespot.com/articles/the-30-fee-epic-is-fighting-apple-over-began-with-/1100-6481363/

[78] SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE OF THE JUDICIARY, *supra* note 55 at 343-344

[79] Hayley Williams, *supra* note 77

[80] Jack Nicas, *How Apple's 30% App Store Cut Became a Boon and a Headache*, THE NEW YORK TIMES (Aug. 14, 2020) https://www.nytimes.com/2020/08/14/technology/apple-app-store-epic-games-fortnite.html

with charging such high prices because developers are forced to pay them or abandon the massive smartphone market entirely. Developers could forgo the iOS market entirely, but choosing to do so would cause them to lose out on a significant amount of revenue. Even though iPhone users comprise only 15% of the overall phone market, they spend twice as much money on apps than users of other devices, making them an incredibly attractive option for developers.[81] A similar type of situation could be seen with gaming consoles, which also charge a similar 30% commission fee for any game purchased through their market.[82]

A comparison of fees on these restricted stores to commission fees charged by competitive supports the claim that stores on these restricted devices are charging higher prices commission fees. While commission fees on tied online marketplaces typically hover around 30%, commission fees used for other online markets, which have to directly compete with other options, are much lower. For example, credit cards only charge around a 2% commission fee to stores which accept them.[83] Online marketplaces available through the web, such as Amazon and Newegg, only charge a 10-15% commission fee for companies attempting to sell their products through their stores.[84] Epic, a company which is currently trying to make its own store available

[81] Prachi Bhardwaj and Shayanne Gal, *Despite Android's growing market share, Apple users continue to spend twice as much money on apps as Android users*, BUSINESS INSIDER (July 6, 2018), https://www.businessinsider.com/apple-users-spend-twice-apps-vs-android-charts-2018-7

[82] Hayley Williams, *supra* note 77. While a developer could choose to forgo the console market entirely in favor of only offering their games on PC, the console market represents a significant portion of customers that a developer would have to be willing to abandon. Pedro Palandrani, *Video Game Industry Hits Reset in 2020*, GLOBAL X ETFS (Feb. 28, 2020), https://www.globalxetfs.com/video-game-industry-hits-reset-in-2020/#:~:text=Despite%20the%20growth%20in%20PC,gaming%20market%20at%20%2445.3%20billion.&text=PCs%20fall%20slightly%20behind%20with%2024%25%20market%20share%20or%20%2435.3%20billion. (Consoles make up 30% of the 2019 global gaming market while PCs only make up 24%)

[83] Credit Card Processing Fees and Rates Explained , SQUARE (Last Accessed Feb. 17, 2021) https://squareup.com/us/en/townsquare/credit-card-processing-fees-and-rates

[84] *Amazon Pay fees*, AMAZON (Last Accessed 2/17/21) https://pay.amazon.com/help/201212280; *Sellers*, NEWEGG (Last Accessed 2/17/21), https://www.newegg.com/sellers/ (Listing Commission Fees)

on iPhone devices, also only charges a 12% fee.[85] Comparisons such as these suggest that restricted online marketplaces are able to charge higher than usual prices given the lack of competition on their platforms.

ii. Opacity of Curation Review

Another concern is the extent to which the curation of applications available on restricted marketplaces arbitrarily restricts consumer access to products. Apps and software that are available through these stores have to go through a rigorous process set up by the product owner.[86] Companies like Apple and Sony have an incentive to maintain quality control over what is available on their devices to protect both their reputation and the consumers using their products. Some level of restrictions should be applied to make sure that applications are up to their standards. At the same time, the process through which apps are approved is not very transparent, and some developers have complained that their apps have been rejected for arbitrary or unclear reasons which could be cover for other, anti-competitive reasons.[87]

iii. Governmental and Regulatory Concerns

The concerns listed above have led more and more consumers, writers, and developers to take steps against some of these tied marketplaces. The largest industry example of this has been recent litigation against Apple by the developer Epic Games.[88] In a lawsuit filed in August 2020, Epic alleged that the App Store and Google Play Store violated antitrust laws by monopolizing

[85] *FAQ,* EPIC GAMES STORE (Last Accessed Feb. 17, 2021), https://www.epicgames.com/store/en-US/about#:~:text=Epic's%2012%25%20share%20covers%20the,and%20makes%20us%20a%20profit.
[86] Paul Boutin, *supra* note 70
[87] Josh Baskin, Competitive Regulation of Mobile Software Systems: Promoting Innovation through Reform of Antitrust and Patent Laws, 64 Hastings L.J. 1727, 1735-36 (2013) (Discussing potential for anticompetitive activity in curated online markets); *iPhone Developers Grumble Over Latest App Flap; Apple's vetting of the Ninjawords dictionary app for the iPhone has developers questioning the App Store approval process*, INFORMATIONWEEK (Aug. 6, 2009), https://search.proquest.com/docview/223244343?accountid=10226&pq-origsite=summon
[88] Complaint, Epic Games, Inc. v. Apple, Inc, (N.D. Cal., 2020)

their respective markets[89]. Their complaint list several of the problems mentioned above, as well as the fact that, if able, Epic would provide their own competing marketplace on these devices that would charge a noticeably lower commission fee to developers. The European Commission has also initiated antitrust investigations into the Google Play store and App store, based on similar potential tying violations in their marketplaces[90]. Most of these lawsuits and investigations have focused on the tying of smartphones rather than more specialized devices.

In addition, recent developments in legal and economic literature have suggested that antitrust law should be modified to prevent potential abuses in these online markets. Most notably, the House Subcommittee on Antitrust released a thorough report discussing technology-based antitrust concerns, including a discussion on tied marketplaces.[91] Among the topics discussed were concerns about possible abuses in these markets and the effects the negative impacts these ties had on competition and developers attempting to sell their products[92].

iv. Application of these Rules to Online Markets

While Congress has suggested that they would like some reform in this area, the question of how to uniformly apply such reform across different devices poses a thorny problem. For example, while many concerns about marketplace abuse deal with the modern-day smartphone market, rules on tying implicate a huge variety of products. A regulatory development in this

[89] *Id.*
[90] *Antitrust: Commission opens investigations into Apple's App Store rules*, EUROPEAN COMMISSION (Feb. 17, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073
[91] Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, *supra* note 55
[92] Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, *supra* note 55 at 340-341

area which stretches too far could hinder growth in tech markets which the US has benefitted from.[93]

C. Problems with the Rule of Reason and Current Standard

Since it may be difficult to apply standard tying rules to some technological devices, courts and legislators could decide to stick to *Microsoft*'s "Rule of Reason" standard. Staying with the Rule of Reason certainly comes with benefits. Courts like to use the rule of reason when dealing with new market because it allows for different rulings based on different sets of facts on the ground,[94] rather than serving as a kind of "one size fits all" rule that may be unfairly burdensome to certain companies.[95] Under the rule of reason, courts weigh whether or not the pro-competitive benefits of an action outweigh the potential anti-competitive effects of the same action. As a result, a rule of reason may be able to take into account the nature of a specific technological market when determining whether a specific software tie would be appropriate. Theoretically, the "rule of reason" could perfectly differentiate between the problems listed in the examples above, and determine whether a tie is actually appropriate in each scenario.[96] It also avoids requiring courts to delve into the difficult question of whether these markets actually constitute "separate products" for the purposes of tying law.

While the above scenario presents an ideal solution if the rule of reason was able to perfectly accommodate for all of these factors, in practice the rule of reason has left a lot to be desired. First, application of the rule of reason to all these potential technology cases raises a

[93] James F Ponsoldt & Christopher D. David, A Comparison Between U.S. and E.U. Antitrust Treatment of Tying Claims Against Microsoft: When Should the Bundling of Computer Software Be Permitted?, 27 Northwestern J of Int L & Business 421 (2007); Hamilton, *Supra* note 4; Baskin, *supra* note 54 at 1735-36 (discussing benefits of Apple's behavior)

[94] Donald L. Beschle, What, Never Well, Hardly Ever: Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality, 38 Hastings L.J. 471, 472 (1987).

[95] *Id*.

[96] United States v. Microsoft Corp., 253 F.3d 34, 95 (D.C. Cir. 2001).

potential issue of administrability[97]. With so many technology-based antitrust concerns potentially looming on the horizon (see all of the cases which have been brought in the past few months), it may be particularly burdensome, if not impossible, for courts to make a full, thorough rule of reason analysis.[98]

This problem leads to another issue with the rule of reason: courts may not have the adequate expertise and knowledge of technology markets to determine whether tie is or is not reasonable. Recently, the antitrust field has voiced some concerns that the pure rule of reason standard has allowed for too much monopolization and consolidation within the technology industry.[99] Specifically, they argue that the rule of reason analysis makes it difficult to measure factors such as "lost opportunity" or efficiencies that occur due to other firms being unable to compete[100]. To take an example, it is quite easy for a court to see and measure the inefficiencies that would be lost by breaking a firm like Amazon apart – Amazon themselves can provide data on efficiency of scale, how their business ventures interact with one another, etc.[101] It is a lot harder to gather evidence on the impact theoretical successful businesses would on the market.[102] While economists may point out that such a situation may be plausible, without the existence of a but-for world, courts have been reluctant to accept such reasoning under the "Rule of Reason".[103]

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[97] Jesse W. Markham Jr., *Sailing A Sea of Doubt: A Critique of the Rule of Reason in US Antitrust Law,* 17 Fordham J Corp. & Fin L 591, 614 (2012); Herbert Hovenkamp, Federal Antitrust Policy: The law of Competition and Its Practice (West Academic Hornbook Series, 5th ed., 2015)
[98] Markham, *supra* note 97 at 614-615.
[99] *See* Subcommittee on Antitrust, *supra* note 55
[100] *Id*.
[101] Lina Khan, Amazon's Antitrust Paradox, 126 Yale L J 710, 737-746 (2017)
[102] *Id*.
[103] It is for this reason that the aforementioned Congressional report expressed a desire for antitrust reform in the technology market to remedy such problem. Subcommittee on Antitrust, *supra* note 55 at 3

The final problem with the current rule of reason standard is that it makes it more difficult for companies to know when exactly they may be crossing some sort of line with respect to antitrust rules. While the rule of reason provides a more favorable and less stringent standard than traditional per se rules, it also grants courts more flexibility in applying this standard to new facts on the ground.[104] This means that tech companies which may have to deal with new technological markets may not be on firm footing with regard to when and if they are actually in violation of antitrust laws[105]. There has been some concern that the lack of a firm standard may discourage smaller firms from expanding into certain markets or creating new products out of a fear that they may be found in violation of some antitrust law[106].

The growing number of antitrust cases present in these markets may serve as an indication that some of these problems are coming to the foray. Aside from the aforementioned cases and investigations into Apple, the last six months has also seen litigation against Facebook regarding their own merger and tying practices, and Google with respect to several of their tying practices. The creation of all of this litigation indicates that there is some dissatisfaction with the current status quo and indicates that the current rule of reason standard may not be the best standard to apply to these cases as is.

D. Proposed Alternate Solutions

i. Breaking Up Firms

If courts decide to utilize an alternative to the rule of reason, there are several options they could choose from. One option is to break up some of the larger firms into smaller

[104] Markham *supra* note 97 at 615, Beschle *supra* note 1 at 473-475
[105] Markham *supra* note 97 at 615
[106] Ponsoldt, *supra* note 93 at 421 (Discussing concerns that Rule of Reason may be too ambiguous for potential developers).

component parts which apply to each individual piece of technology made.[107] Breaking apart larger firms has been a proposed solution in other antitrust cases when certain firms get too large, most notably in Standard Oil and AT&T[108]. Interestingly, the idea to break up the Microsoft corporation was also floated by the government and the lower court in US v. Microsoft, although the DC Circuit eventually decided that such a decision would not be reasonable.[109]

What would it look like to break up and divide firms within this context? A full-scale break-up would likely require the division of each company that made separate parts of the final product to be split into different entities.[110] For example, the division of Apple that created the physical iPhone would be split off from the firm that actually developed iOS software. The division in charge of running and maintaining the App Store may also have to constitute a separate company entirely. For a product like a game console, a breakup would likely be proposed.[111]

While this solution may seem radical, the idea of breaking up these companies into separate component parts has been floated before.[112] Although the goal of these companies is to create one final unified product, such as a streaming device or a game console, there is no rule

[107] *Elizabeth Warren speaks of breaking up big tech firms for competition, CNBC says*, THE FLY (Mar. 8 2019) link.gale.com/apps/doc/A577565939/ITOF?u=columbiau&sid=ITOF&xid=25c86ace; Matthew Yglesias, *The push to break up Big Tech, explained*, VOX (May 3 2019), https://www.vox.com/recode/2019/5/3/18520703/big-tech-break-up-explained; Kenneth Rogoff, *Has Big Tech gotten too big for our own good?*, MARKETWATCH (July 11, 2018) https://www.marketwatch.com/story/has-big-tech-gotten-too-big-for-our-own-good-2018-07-02

[108] Federal Trade Commissioner Noah Joshua Phillips, *We Need to Talk: A Serious Conversation about Breakups*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/system/files/documents/public_statements/1517972/phillis_-_we_need_to_talk_0519.pdf at 6-14

[109] United States v. Microsoft Corp., 253 F.3d 34, 98 (D.C. Cir. 2001)

[110] United States v. Microsoft Corp., 253 F.3d 34, 98 (D.C. Cir. 2001)

[111] Although such as division may sound ridiculous today, a similar idea was what ultimately lead to the creation of the first PlayStation. Rob Fahey, Farewell, *Father Charting the rise and fall of Ken Kutaragi*, EUROGAMER (Apr. 30, 2007) https://www.eurogamer.net/articles/farewell-father-article

[112] Timothy F. Bresnahan, Shane Greenstein, Technological Competition and the Structure of the Computer Industry, 47 J Industrial Econ 1 (1999) (Discussing the benefits of divided vertical components of technological developments and its positive impact on competition)

saying that each component part must be designed and made by the same firm in order to operate at maximum efficiency. Furthermore, other industries trying to sell a single unified product nevertheless rely on multiple firms to actually create and develop crucial parts to the product's use. For example, in the car industry, the Honda corporation may design most of the critical parts present in a car they are selling, but rely on a company like Michelin to craft their tires.[113] Such a solution could be workable within the tech industry.

Although breaking up these firms into smaller corporations would have the effect of decreasing the individual monopolies held by specific tech companies, it is probably not the right approach to take in this situation. Firstly, many current tech companies are sufficiently integrated to the point where a breakup of the firms would cause substantial chaos within the tech industry.[114] Not only would certain divisions lose access to data and resources they would otherwise have,[115] but software developers and designers who previously only had to deal with one company would suddenly be dealing with several, making it significantly more difficult for them to actually create and design their software.[116]

Furthermore, there do seem to be significant efficiencies created by allowing companies to create specific software for the devices they create. Not only are these companies able to cooperate to more easily design the specs of their hardware around their software, but they also avoid have to pay extra for software once the product is actually developed for them.[117] A break up could make it more expensive to develop new hardware and software, while not necessarily

[113] *Hankook, Michelin earn supplier awards from Honda*, TIRE BUSINESS (May 24, 2019), https://www.tirebusiness.com/manufacturers/hankook-michelin-earn-supplier-awards-honda
[114] Yglesias, *supra* note 107
[115] *Id*.
[116] *Id*.
[117] Herbert Hovenkamp, *Why Breaking Up Big Tech Could Do More Harm Than Good*, WHARTON BUSINESS DAILY (Mar. 26, 2019) https://knowledge.wharton.upenn.edu/article/why-breaking-up-big-tech-could-do-more-harm-than-good/

resulting in a better product.[118] There is also little evidence that consumers actually want to purchase hardware and software separately. Most consumers are not experts in software functioning and development,[119] and are unlikely to recognize or know enough to pick out which software is superior to another on their own. Furthermore, when purchasing hardware, they prefer for software to be bundled with the product.[120] As a result, it seems like it may be more efficient to keep these products under one umbrella.

It is likely for these reasons the *Microsoft* court rejected the idea of splitting a large tech company like Microsoft up into separate, smaller firms focused on hardware and software development.[121] Although some kind of break-up of these companies may seem like a plausible solution, it would likely not be the best option to pursue moving forward.

ii. Common Carrier/Public Utility Regulation

Another possibility involves subjecting certain tech industries to stricter regulation, along the lines of common carrier or public utility regulation. Common carrier obligations are standard in a couple of industries wherein one or a few firms hold significant power over a matter that that impacts a "public interest".[122] The railroad industry provides a classic example of a market subject to common carrier regulation.[123]

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[118] *Id*.

[119] Jakob Nielsen, The Distribution of Users' Computer Skills: Worse Than You Think, NIELSEN NORMAN GROUP (Nov. 13, 2016), https://www.nngroup.com/articles/computer-skill-levels/ (Study across 33 different countries revealed only 5% of the population has "high" computer-related abilities, and only a third of people can complete "medium-complexity" tasks)

[120] Rajiv M. Dewan, Consumers Prefer Bundled Add-Ins, 20 J. Management Information Systems 99, 101 (2003)

[121] United States v. Microsoft Corp., 253 F.3d 34, 98 (D.C. Cir. 2001)

[122] Francis P. Mulvey and Michael F. McBride, Railroads' Common Carrier Obligation: Its Legal and Economic Context, 2-3 (April 2020)

[123] *Id*. at 4-8. Consumers using railroads often had little other option for transportation over long distances, and the industry was dominated by a few large firms who did not do much to compete with one another. As a result, the government saw fit to impose strict obligations on railroads to make sure that customers were treated fairly and that their authority in the market was not being misused

As time has moved on, the government and courts saw fit to impose these types of regulations on other industries. These industries tend to operate under total monopolies, such as utility companies,[124] or be able to obtain local monopolies, such as telecoms companies like AT&T and Verizon.[125] Although government has recently been loath to impose common carrier obligations on new industries, some scholars have suggested that they may play a useful role in the regulation of certain types of tech.[126]

One could certainly make an argument that the imposition of common carrier obligations on the operators of these online markets could provide a solution some of the problems currently seen in these markets. In order to avoid higher than average commission fees, the government could instead impose regulations determining what a "reasonable" commission fee would be. In order to make sure that these markets are not abusing their discretion in determining what apps are available, the government could impose stricter standards regarding rejection of applications and require a more transparent process for app developers. It would seem that many of the problems listed above which are prevalent in the current app ecosystem could be solved by the imposition of such regulations.

While common carrier solutions may be able to provide a sense of regulations that could work well for some of the abuses that could be present in these marketplaces, they may not be a perfect fit for digital markets. Common carrier obligations are typically imposed in situations where a market either tends to trend toward a natural monopoly, or wherein firms within the

[124] Regulation of Public Utilities and Common Carriers, CORNELL LAW SCHOOL (Last Accessed Feb. 18, 2020), https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/regulation-of-public-utilities-and-common-carriers

[125] Gary J. Guzzi, Breaking up the Local Telephone Monopolies: The Local Competition Provisions of the Telecommunications Act of 1996, 39 B.C. L. REV. 151, 151-152 (1997). *See also* Wesley W. Wilson, Yimin Zhou, Telecommunications deregulation and subadditive costs: Are local telephone monopolies unnatural?, 19 Int J Industrial Organization 909, 909-911 (2001). (Detailing how obligations helped weaken phone company's local monopolies.

[126] Khan *supra* note 56 at 797-802

market hold so much power over customers that they could abuse their authority without significant pushbacks[127]. Since common carrier laws tend to impose harsh penalties and regulations on these businesses that harm their ability to adapt in the market, it is generally seen as inadvisable for these restrictions to be imposed on businesses in other contexts[128]. These restrictions can also lead to monopolies in markets that would not otherwise have them, since these compliance with these can make it more difficult for others to enter and grow within the market (see, for example, telecoms and electricity)[129].

I do not believe that online markets such as the App Store or a gaming store fit under either of these umbrellas. Nothing about the nature of online storefronts tend to indicate that it should be a natural monopoly. While restricted markets like the App Store maintain a "monopoly" on their respective devices, this is more so a result of other online stores not being barred from competing at all than a natural market result.[130] On Android phones, for example, other App Stores are allowed to compete with the Google Play store and were able to find success.[131] Plenty of different online markets which have also been able to compete with one another on PCs. For example, the Epic Games Store[132], which is owned by the same company suing Apple of their restrictions on iOS devices, competes vigorously with Valve's Software distribution store, Steam[133], to sell games on PC devices. Epic's entry into the market has led to

[127] *See* Regulation of Public Utilities and Common Carriers, *supra* note 124
[128] William A Mogel and John P. Gregg, Appropriateness of Imposing Common Carrier Regulations on Interstate Natural Gas Pipelines, 4 Energy L J 155, 181-183 (1983) (Discussing problems with imposing common carrier obligations on a different industry, natural gas, which may not fit well). *See also* Robert Quinn, *Ex Parte* Letter, AT&T (May 9, 2014), https://www.scribd.com/document/223147218/May-9-Ex-Parte-Letter (Letter by AT&T discussing potential problems of imposing common carrier rules on broadband internet).
[129] *Id.*
[130] Complaint, Epic Games, Inc. v. Apple, Inc at 17-19
[131] *See* EPIC GAMES STORE (Last Accessed Feb. 18 2021), https://www.epicgames.com/store/en-US/; Daria Dubrova, *9 Alternative Android App Stores*, THE APP SOLUTIONS (Last Accessed Feb. 18, 2021), https://theappsolutions.com/blog/marketing/alternative-android-app-stores/
[132] EPIC GAMES STORE Last Accessed Feb. 18 2021), https://www.epicgames.com/store/en-US/
[133] STEAM (Last Accessed Feb. 18, 2021), https://store.steampowered.com/

Valve charging lower commission fees to developers and led other storefronts to compete more on price[134].

All in all, there is little evidence that online markets such as these trend toward a natural monopoly. Much like with physical storefronts, customers tend to appreciate the ability to shop online at different stores and compare prices between them.[135] In other markets where common carrier rules have been discussed, such as social media, a few companies such as Facebook, Pinterest and Twitter dominate the market with a 95% share.[136] But even Amazon, with all the talk of its monopoly power and potential abuses in the market, still only constitutes a 26% share of the market.[137]

There is also little evidence that consumers using some of these online markets are at the complete mercy of these online marketplaces. Although consumers using a product like an iPhone are required to use the App Store to download apps, nothing would prevent them from switching smartphone devices if burdens on them were too onerous[138]. Individuals are not as reliant on any one particular smartphone as they may be on needing a place to stay for the night or needing a method of transportation from one place to another.

For the above reasons, common carrier obligations do not seem to be a great fit for these online markets. Although one could propose regulations that may be able to curb some of the

[134] Tom Ivan, *Valve CEO says Epic Games Store competition 'awesome for everybody'*, VIDEO GAMES CHRONICLE (Mar. 20, 2020) https://www.videogameschronicle.com/news/valve-ceo-says-epic-games-store-competition-awesome-for-everybody/

[135] KPMG CONSUMER MARKETS, THE TRUTH ABOUT ONLINE CONSUMERS 27 (2017) (Ability to compare prices between stores listed as 2nd biggest reason consumers shop online)

[136] *Leading social media websites in the United States in January 2021, based on share of visits*, STATISTA (Last Accessed Feb. 18, 2021) https://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/

[137] Don Davis, *Amazon's share of US online retail revenue dips slightly in Q3*, DIGITAL COMMERCE, Nov. 3, 2020.

[138] Answer to Complaint, Epic Games, Inc. v. Apple, Inc, (N.D. Cal., 2020) at 18.

more extravagant abuses within online markets, a full-on common carrier designation may unfairly hinder the industry while only entrenching current power structures.

iii. Revisiting Market Definition

Another solution to this problem could involves revisiting the traditional definition of "separate markets" as it applies to certain tech industries. Currently, a rule of reason standard is applied to technological ties rather than the standard tying analysis[139]. Standard tying analysis typically goes through two parts as outlined by *Jefferson Parrish*. First, a determination is made as to whether or not two different products actually constitute a "separate market".[140] Second, a determination is made as to whether or a corporation is abusing their market power within a specific market to leverage a tie between two different products.[141] This standard is more stringent than the rule of reason analysis, and courts since *Microsoft* have been reluctant to apply it.

This reluctance made some sense at the time that the court decided *Microsoft*. At the time, computer markets were fairly new, and even experienced economists at the time had trouble puzzling how different factors would interact with one another in the future. For example, some of the topics involved in the case involve Netscape, which died out a few years later, and potential middleware from Java, which also never came to fruition.[142]

The fact that *Jefferson Parish* utilizes a more formalistic rather than functionalistic approach may explain another reason why the court decided to switch. The test used by the *Jefferson Parish* court looks more to the form or design of a product rather than closely

[139] Microsoft Corp., 253 F.3d at 84
[140] Jefferson Par., 466 U.S. at 19
[141] *Id*. at 21
[142] Microsoft Corp., 253 F.3d at 74

examining how the product functions.[143] While this may be a viable proxy for traditional products, the advent of some technologies has allowed for products with similar capabilities being created for vastly different uses,[144] which may merit a more functionalistic approach. With the limited knowledge they had at the time, the Microsoft court made the best guess they could as to how to approach in the future, and it made some logical sense to take a hands-off approach.

At the same time, now these technology markets have been operating for another 20 years, and courts and economists both have a better idea as to how different market players and technologies interact with each other. Although market players like Google, Netscape, and Java at the time were all fairly new players who the court was worried about unduly burdening, now there is little question that players like Google, Microsoft, Amazon, and Apple are all established players who have had wild success.[145] It may make some sense to use this knowledge to back away from the "rule of reason" approach that was applicable to unknown markets and instead urge a return to more traditional tying rules.

The largest problem with moving back to something similar to *Jefferson Parish* is figuring out how adapt it to online markets. Even though more is known about the development and uses of technology markets now than 20 years ago, it may prove difficult for courts to apply exact same tying standards used for other products. Software and hardware does benefit from

[143] For example, looking to whether anesthetics and surgeries *could* be purchased separately rather than whether they traditionally, or *functionally*, are.

[144] For example, some smart fridges run off of the same OS as Android phones, *Samsung's T9000 smart refrigerator runs on Android, includes apps like Evernote and Epicurious*, GADGETS 360 (Jan. 22, 2013), https://gadgets.ndtv.com/others/news/samsungs-t9000-smart-refrigerator-runs-on-android-includes-apps-like-evernote-and-epicurious-320610)

[145] *See* profits for Microsoft https://venturebeat.com/2020/10/27/microsoft-earnings-q1-2021/#:~:text=Microsoft%20today%20reported%20earnings%20for,of%20%241.14%20in%20Q1%202020).; Apple https://www.apple.com/newsroom/2020/10/apple-reports-fourth-quarter-results/; Google https://www.usatoday.com/story/tech/2019/10/28/alphabet-earnings-googles-parent-falls-short-third-quarter-profit/2490832001/

certain market ties,[146] and it can be beneficial to put in place rules that do not actively discourage their development. Instead, courts should use the information learned in the last 20 years to slightly modify the traditional "tying" test outlined in Jefferson Parish. Specifically, redefining what actually constitutes "separate products" for the purposes of the "Jefferson Parish" test could provide an important limitation on the expansiveness of antitrust liability, while still providing a chance to litigate against other abuses.

Part III: Crafting a New Standard for "Separate Products"

This section will argue for the implementation of a modified version of the Jefferson Parish standard to determine whether an illegal tie has taken place. It will first compare products in the technology market to figure out what standards should be used to determine whether something is a "separate product". It will then use those standards to create a new test. Finally, this sample test will be applied to products in more of a "grey area" marketwise to see how courts might practically apply it.

A. What Exactly Is a "Separate Product"?

The test of whether or not two different goods actually compete in "separate markets" is a crucial part of any determination that two products are actually tied together.[147] If two different "goods" are determined to be a part of the same final product, then a tie between them cannot possibly exist.[148] Traditionally, however, in order for something to be declared a part of the same market as another good, it needs to be practically essential for the product's actual use, or otherwise not be commonly sold as a separate product.[149] This is a high bar to meet.

[146] Rajiv M. Dewan, Consumers Prefer Bundled Add-Ins, 20 J. Management Information Systems 99, 101 (2003)
[147] Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC, 532 F.3d 963, 974–75 (9th Cir. 2008)
[148] Jefferson Par., 466 U.S. at 19
[149] *Id*.

Courts have been reluctant to declare that even two different products which are practically essential to the others' use actually constitute the same product. In *Jefferson Parrish* case, the court declared that a specific type of surgery constituted a separate product market from anesthesia, even though no one would want to undergo surgery without anesthesia and no one pays for anesthesia typically without having to undergo some type of surgery.[150] A similar ruling was seen in the original US v. Microsoft case, where the court declared the Microsoft Windows operating system was a separate product from the individual software actually installed in it,[151] even though most people would not download an operating system without some presets installed into it and software was unusable without an operating system to open them with.[152]

While this sort of "separate markets" test has worked for more traditional markets which existed around the time of *Jefferson Parish*, it is not as easily transferable to software products. Software can become hopelessly intertwined with other software products or physical hardware in a way that makes it difficult to actually separate them out[153]. For example, a program such as Microsoft Word includes a variety of smaller, separate software functions such as a Spell Checker which is critical to the product's overall utility. When analyzed under the traditional separate products test, these smaller programs could be seen as separate products from the actual Microsoft Word Software. At the same time, the use of these functions is so intertwined with Word's functionality that it is hard to imagine buying them as separate products.[154] It could be

[150] *Id*.
[151] Microsoft Corp., 253 F.3d at 86-87
[152] *Id*.
[153] David Heiner, Assessing Tying Claims in the Context of Software Integration: A Suggested Framework for Applying the Rule of Reason Analysis, 72 U Chi L Rev 123, 126-128 (2005); Daneil Engber, Who Made That Autocorrect?, NEW YORK TIMES (June 6, 2014), https://www.nytimes.com/2014/06/08/magazine/who-made-that-autocorrect.html
[154] *Id.*

that a new definition of what defines a "separate product" may be needed when considering software markets.

B. Finding a New Definition of "Separate Products"

i. The Extremes

To figure out how "separate products" may it defined, it may be a good idea to start by contrasting two very different products. One serve as an example of a combination of hardware and software which one could intuitively view as a single product. The other could serve as an example of two separate products hardware/software products which happen to be bundled together. By contrasting what makes them different, one may get an idea of when two goods in the technology market reasonably become "separate"

One simple example of product which uses both hardware and software, but which could still be viewed as a single product, is a garage door opener. Although a specific case regarding this product has not been litigated,[155] it would likely not qualify as a tie. Most people are not going shopping for the software available in garage door openers on their own.[156] This technology is also essential in the fundamental operation of a garage door opener, and it would be very difficult to imagine a garage door opener being sold without software inside it, and vice versa.[157] Another example of a unified product could be a thermostat. Modern thermostats have technology which can serve a multitude of functions, including setting temperature, making a calendar for when one wants to set their temperature, or setting a timer.[158] At the same time,

[155] Most likely because it would be seen as frivolous
[156] Ram Doors, *supra* note 44
[157] *Id*.
[158] Thermostats, HOME DEPOT (Last Accessed Feb. 19, 2021), https://www.homedepot.com/b/Heating-Venting-Cooling-Thermostats/N-5yc1vZc4lf

most thermostat programs are bought included with the type of thermostat[159], and no market exists for separate thermostat software. Much like with a garage door opener, the inclusion of thermostat software in the operating system can be seen as an essential part of the product.

At the other end of the spectrum, one can look at the programs and markets available on a PC. Here, the types of software and online markets available on a PC would seem to much more clearly be a separate product from operating system. Although one could make an argument that the essentials of a PC Operating System could be seen as a single product when bundled together with a computer, it is hard to imagine additional software that dealt with online markets as part of that same, unified product. In stark contrast with something like the software available on a thermostat, it is quite easy to find separate markets for various kinds of software sold on a PC.[160] Furthermore, there is plenty of software that a PC could be functional without. One could imagine someone using an OS without Microsoft Office installed, even though most people like to use the program[161]. Similarly, one can easily picture PCs being installed without a set online market, as that is how they are created right now[162]. If anything, something like Microsoft attempting to tie a particular online store to their operating system would be seen as a flagrant antitrust violation.

Although it these products may simply seem intuitively different from one another, it is equally important to examine the underlying reasons why that may be the case. There are two

[159] Meagan Wollerton, *The best smart thermostats of 2021*, CNET (Feb 1, 2021), https://www.cnet.com/news/best-smart-thermostats-to-buy-this-year; John Delaney, *The Best Smart Thermostats for 2021*, PCMAG (Jan 21, 2021), https://www.pcmag.com/picks/the-best-smart-thermostats (Describing popular smart thermostats, all come pre-installed with specific software).
[160] *See*: the stores listed throughout this paper
[161] Nate Drake, Brian Turner, *Best Microsoft Office alternatives of 2021: Free, paid, online mobile office suites*, TECHRADAR (Nov. 10, 2020), https://www.techradar.com/news/best-microsoft-office-alternative (Listing alternatives to Microsoft Office that one could install).
[162] *See* – all the various software stores listed *supra* FN 50

key differences in these products that we can look at more closely in order to examine what a "separate products" test may look like in the tech industry.

The first is how essential a piece of software is to the use and functioning of the final combined product. The software that makes a garage door opener function is critical to the actual operation of the product.[163] Without that software, the door would cease to function and become an expensive clicker.[164] The software present in a Smart Thermostat is similarly essential to its operation.[165] This type of software could be similarly seen as a key component of the makeup of these instruments.

In contrast, most software aside from something like the code used to make up an operating system, are not truly essential parts of PCs being sold.[166] One could easily imagine a situation in which someone purchases a Windows or Apple PC without much software installed on it while still being able to use it as they wish[167]. This is particularly true for something like online stores, which, for the most part, do not come pre-installed. The differentiation in how much this individual software serves as a key factor in the final product can be one way with which to differentiate separate markets.

The second fact which makes these products seem intuitively different relates back to another test used in *Jefferson Parish*. Namely, how much consumers would actually want to use a piece of software or online market separate from the product that it is being bundled with.[168] Typically, this test is administered in the second step of a tying examination,[169] but a more more

[163] Ram Doors, *supra* note 44
[164] *Id*.
[165] Erika Rawes, *What is a smart thermostat?,* DIGITAL TRENDS (Dec. 2, 2019), https://www.digitaltrends.com/home/what-is-a-smart-thermostat/ (Discussing how Smart Thermostats work)
[166] Microsoft Corp., 253 F.3d at 89
[167] *Id*. Also see earlier part discussing different software pre-installations
[168] Jefferson Par., 466 U.S. at 19
[169] *Id*., Microsoft 253 F.3d at 89.

functional variation of the test may be more appropriate in step one.[170] Rather than looking directly at how the hardware and software of these products is designed, the test proposed here will look more at how these products actually function in terms of their use.

Although the actual utility of a product may initially seem unrelated to whether or not a product actually constitutes a "separate market", it actually makes sense as an important factor once one takes in its potential impact on consumer efficiency. As an example, a thermostat has smart technology to control the heaters in the rest of the house, and runs an app associated with it.[171] While this "app" may be hooked online for interactivity with other products, and the software could be considered literally separate for the physical product, consumers are unlikely to want to have to pick between multiple different apps every time they purchase a thermostat.[172] App quality is much more likely baked in to a buyer's initial purchase decision when picking a thermostat.

Contrast this the overall utility and versatility of something like a PC. A PC has a wide array of uses, from typing up documents used for papers, to sending in job applications, to communicating with others. With something like an app on a thermostat, it would be reasonable to expect consumers to connect the quality of the app with their choice in purchasing the device[173], as it has a very limited application. With something with as much utility as a PC, it may be be unreasonable to expect or force consumers to take into account the lock-in they could

[170] It should also be noted that the Jefferson Parish test also utilizes a more formalist approach to analyzing these kinds of ties. That is, the test normally examines the form a product takes rather than the functions it is used for. As mentioned in Part II, this type of approach may not be the most appropriate method to take when it comes to technology markets

[171] Rawes, *supra* note 165

[172] *Id*. for description; refer back to articles regarding consumer choice article talking about consumer knowledge/specification for a product like this.

[173] In fact, consumer buying guides and reviews for these products specifically include discussion on App/Software quality. *See* Meagan Wollerton, *Smart thermostat buying guide*, CNET (Apr. 6, 2017); *Thermostat Buying Guide*, CONSUMER REPORTS (Apr. 30, 2019), https://www.consumerreports.org/cro/thermostats/buying-guide/index.htm

have with the massive variety of uses that the product would be available for. The wide utility and diversity of these uses also implies that consumers would prefer to have some choice in how their products actually gets used. Thus, by one can see that the variety and utility of a product can actually play an essential role in determining whether a technological product could actually be a part of a separate market.

ii. Creating the Test

While terms like "versatility" and "usability" may be something that a layman can understand, and perhaps even be something which courts could have an intuitive sense of, they are not terms that apply directly to the technology. What does it mean exactly for a product to be "versatile"? How does one determine if a product has a variety of different "uses"? It is quite easy to imagine courts getting confused attempting to apply these terms, resulting in haphazard application.[174] Even worse, leaving it up to generic terms like these may make it difficult for programmers to tell when they are stepping over or staying within the lines of antitrust law, creating problems of their own.[175] The use of some kind of proxy measurement for the "versatility" of a device which programmers would be more familiar with could help to clarify some of these issues.

Fortunately, there does appear to be a proxy which courts could look at to determine the intended scope of a products use: the user's access to core files and APIs. Application Programming Interfaces, or APIs, are the method through which two different programs in a piece of software are able to communicate with one another.[176] For example, when one makes a

[174] Ponsoldt, *supra* note 93 at 449-450; Coates v. Cinncinnati (Supreme Court concerned about vagueness in a statute/rule)
[175] Ponsoldt, *supra* note 93 at 449-450
[176] For a more in depth explanation of APIs, *see* Tim Slavin, *What is an API?*, KIDS, CODE AND COMPUTER SICENCE MAGAZINE (Apr. 2014), https://search.proquest.com/docview/2326542832?pq-origsite=summon

post on a social media site such as Facebook, APIs are what allows that post to transition from your keyboard to your home page.[177] APIs are also what allow you to receive notifications that others have liked, or commented on your post. In short, APIs are what allow programs and applications to interact with one another.[178]

Since APIs can control what programs are able to talk to one another, and indeed what applications and uses a piece of software may be able to run, they may serve as an excellent proxy for the scope and versatility of a piece of software. A court could theoretically ask the developers about the APIs available on their software[179], examine what their overall intended use and purpose is[180], and make a final determination as to whether a piece of software was intended to have a fairly broad or fairly limited scope.

There is one problem to using this test however: some pieces of software and operating systems have similar types of APIs on them.[181] This is due to the fact that rather than create software whole cloth, many developers opt to base their program APIs off of pre-existing

[177] *Id*.
[178] *Id*.
[179] *See* Amy Reichert, Testing APIs protects applications and reputations, TECH TARGET (Mar. 24, 2015), https://searchsoftwarequality.techtarget.com/tip/Testing-APIs-protects-applications-and-reputations (Discussing how developers can access and test their own APIs).
[180] *See* Jonathan Freeman, *What is an API? Application programming interfaces explained*, INFOWORLD (Aug 8, 2019), https://search.proquest.com/docview/2269775242?pq-origsite=summon&accountid=10226, (Discussing how APIs are used to "define… interactions" with users).
[181] This is partially a result of many devices running similar operating systems. For example, a Smart Fridges run off of the same OS as Android phones, *Samsung's T9000 smart refrigerator runs on Android, includes apps like Evernote and Epicurious*, GADGETS 360 (Jan. 22, 2013), https://gadgets.ndtv.com/others/news/samsungs-t9000-smart-refrigerator-runs-on-android-includes-apps-like-evernote-and-epicurious-320610), Xbox systems run off a modified version of Windows OS, *OneCore to rule them all: How Windows Everywhere finally happened*, ARS TECHNICA (May 20, 2016), https://arstechnica.com/information-technology/2016/05/onecore-to-rule-them-all-how-windows-everywhere-finally-happened/2/; and iOS is based off of and can run many similar programs Mac OS iOS: A visual history, THE VERGE, (Sept. 16, 2013), https://www.theverge.com/2011/12/13/2612736/ios-history-iphone-ipad

software.[182] In cases where different devices use similar APIs, it may be difficult for courts and juries to make a determination based solely on APIs as to the scope of a project.

Fortunately, many tech companies have worried about the same problem from a different perspective. Developers are aware that their products include similar types of APIs, even if they are intended to have "simple" uses, like a garage door opener. To prevent users from using their products for unintended purposes, these developers instead restrict the access these users have to the APIs and core files available on their software.[183] This prevents a user with a garage door opener from accidently changing the function of the device, or turning it into some more complicated piece of technology.

This has led to an interesting result. Devices that are more "limited" in scope, like a garage door opener, leave users almost no access to their system's APIs.[184] Products trying to advertise their versatility and use, like a PC, allow for wide access to the systems APIs so that users have access to a wide variety of uses.[185] As a result, by looking to API restrictions in addition to APIs themselves, courts can still have an excellent proxy by which to measure the scope and versatility of an intended product.

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[182] *See* examples *supra* FN 181. For more on differences between PC and Mobile Device APIs, *see Your Desktop API Just Killed Your Mobile App*, SEVENTABLETS (Jul. 14, 2020), https://7t.co/blog/mobile-api-vs-desktop-api/

[183] *See*, Enable additional features, GOOGLE PLAY GAMES SERVICES (Last Accessed Feb. 19, 2021), https://developers.google.com/games/services/console/configuring (Google limiting APIs for use on the Google play store); *API limitations in Shortcuts*, APPLE SUPPORT (Last Accessed Feb. 19, 2021), https://support.apple.com/guide/shortcuts/api-limitations-apd891a6c84e/ios (Apple discussing some API limitations on iPhones); Axel Bruns, *After the 'APIcalypse': social media platforms and their fight against critical scholarly research*, 22 INFORMATION, COMMUNICATION AND SOCIETY 1544 (2019) (Facebook limiting access to their data APIs). Contrast with Windows OS, which lists available APIs, what they do, and allows for access/modification, *Windows API index*, MICROSOFT (Last Accessed Feb. 19, 2021), https://docs.microsoft.com/en-us/windows/win32/apiindex/windows-api-list

[184] *See supra* note 183 for restrictions. A garage door opener does not provide users with a method to interface with its software/coding, so users are not able to interact with their APIs without overcoming significant hurdles.

[185] *Windows API index, supra* note 183

C. How Could this Test Apply to So-Called "Grey Areas"?

The most important argument for the utility of this new standard to courts would be how these courts would be able to actually apply this standard to cases in front of them. A standard that would work out well theoretically would be of little actual use to courts if it ends up being effectively inadministrable or would not be able to effectively deal with edge cases. Even worse, an unclear standard could lead to the same problems that courts and companies currently have the with rule of reason.[186] As a result, it is important to look at how courts could theoretically apply the new "separate products" test to examples which may be in a sort of "grey area"

i. iOS and the App Store

The first example of a product that falls within this "grey area" is an iPhone.[187] Due to its primary function as a phone, as well as the limited capabilities of a portable product, smartphones have some limitations when compared to a typical PC.[188] There has been less software developed for smartphones than computers,[189] the processing power and size of the screen limits what is available on these devices, and the markets for them tend to be highly curated.[190] At the same time, modern smartphones are seen as almost an essential component of daily life.[191] They are used to keep in contact with friends through social media, listen to music

[186] Ponsoldt, *supra* note 93 at 449-450
[187] *See iPhone,* APPLE, https://www.apple.com/iphone/
[188] *See Computer vs. smartphone,* COMPUTER HOPE (Aug. 31, 2020), https://www.computerhope.com/issues/ch001398.htm#:~:text=Desktop%20and%20laptop%20computers%20can,computer%20in%20terms%20of%20performance (Discussing software power)
[189] 1.96 million Apps are available on the App Store (*Number of apps available in leading app stores as of 3rd quarter 2020*, STATISTA (Last Accessed Feb. 19, 2021), https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/) while 35 million are available on Windows 10 (*Microsoft quietly reveals exactly how many Windows apps there actually are (and it's more than you think)*, MSPOWERUSER (Nov. 13, 2021), https://mspoweruser.com/microsoft-quietly-reveals-exactly-how-many-windows-apps-there-actually-are-and-its-more-than-you-think/)
[190] Paul Boutin, *supra* note 70
[191] Mobile Fact Sheet, PEW RESEARCH (June 12, 2010), https://www.pewresearch.org/internet/fact-sheet/mobile/ (Stating about 80% of Americans own a smartphone and about 20% are "smartphone dependent")

through your own library or streaming services, buy products from online stores such as Amazon, or even play games in your free time. While smartphones like the iPhone or Android devices do have limitations and restrictions as to their use, they do seem to offer a widely competitive and useful environment that could be seen as comparable to a PC. This question over whether the App Store constitutes a separate product is particularly relevant due to the current litigation brought against Apple.[192] Although the increasing use and versatility of smartphones cause them to behave more and more similarly to PC than something basic like a garage door opener, this ongoing litigation and the questions that surround prove that it does operate in a grey area where these is some legal uncertainty.

The test first looks at whether the App Store is an "essential component" for smartphone devices. The answer to this question is likely in the negative. Apple would[193] that their App Store is an essential part of the operation of their iPhone devices. Specifically, they may argue that their phones come to users who expect a curated app environment, and the App Store provides an essential delivery function that functionally fulfills that promise.[194] While this is how iPhone devices currently operate, this is chiefly due to the fact that the App Store is the only online store available on iPhone devices[195] more than anything else. It is quite easy to imagine a scenario where iOS devices could provide access to another storefront, or users would be able to purchase software from multiple App Stores. In fact, this kind of storefront is exactly what Epic is arguing that they would try to create if their lawsuit against Apple is successful.[196] As a result, the App Store does not seem like an essential component of iOS or an iPhone.

[192] European Commission, *supra* note 90; Complaint, Epic Games, Inc. v. Apple, Inc, (N.D. Cal., 2020)
[193] And is currently arguing in their litigation battle with Epic
[194] Answer to Complaint, *supra* note 138 at 19-20
[195] Complaint, Epic Games, Inc. v. Apple, Inc at 17-19
[196] Answer to Complaint, *supra* note 138 at 18-19

Moving on to the second part of the test – does the iPhone provide such limited utility that consumers would be able to take into account their limitations when actually purchasing the product beforehand? Apple would probably try to argue that most consumers know exactly what they were getting in to when purchasing an iPhone, as their curated App Store is one of the key selling points for something like an iPhone[197]. At the same time, however, the wide variety of apps available on a smartphone store cuts against this argument. One of Apple's initial marketing slogans for the iPhone was famously, "There's An App for That". This was meant to indicate the wide variety of uses a smartphone could be put towards.[198]

This variety is also reflected in the APIs available to smartphone developers attempting to publish an App on the App Store. Apple lists many of the APIs available on its core system software on their own website, with the purpose of allowing developers to more easily publish the types of apps they want.[199] Even though developers may not be able to modify for use any API they wanted on a smartphone as they would a PC,[200] they are still granted significant freedoms that lean against a determination that the App Store is meant to be limited in scope. As a result, the iPhone's App Store could be considered a separate product.

ii. The App Store and the Apple TV

[197] Bergmayer, *supra* note 71 at 18
[198] Doug Gross, *Apple trademarks 'There's an app for that'*, CNN (Oct. 12, 2021), http://www.cnn.com/2010/TECH/mobile/10/12/app.for.that/index.html
[199] *See Apple Developer Documentation*, APPLE (Last Accessed Feb. 19, 2021), https://developer.apple.com/documentation/ and *Layouts*, APPLE (Last Accessed Feb. 19, 2021), https://developer.apple.com/documentation/uikit/views_and_controls/collection_views/layouts?changes=latest_minor (Providing developers with sample APIs for use in App development)
[200] *See* Catalin Cimpanu, *Apple declined to implement 16 Web APIs in Safari due to privacy concerns*, ZDNET (June 28, 2020), https://www.zdnet.com/article/apple-declined-to-implement-16-web-apis-in-safari-due-to-privacy-concerns/ (discussing Apple denying use of certain APIs on Safari due to concerns with how it would interact with their devices).

Another product which operates in this type of grey area also happens to be produced by Apple: The Apple TV.[201] The Apple TV App store functions similarly to the App Store, but with a focus on Apps available for the Apple TV rather than the iPhone.[202] Unlike a smartphone, however, the Apple TV sees even more limited uses. An Apple TV is not portable like a smartphone is and it confined to a home[203]. The device is used primarily for streaming services and playing videos.[204] While one can download apps like Amazon Video, HBO Max, and Apple's own video store on the device, the number of apps available on an Apple TV are much lower than what is available on an iPhone.

Something like the Apple TV once again presents an interesting question as to whether or not the specific software limitations in the product actually constitutes as separate product. Much like with the iPhone, Apple has made it so that one can only purchase apps or download other software through the official Apple store.[205] In addition, Apple also charges a similar 30% commission fee for any "in-app" purchases made on these devices.[206]

Under the traditional "separate markets" test, the App Store would likely be counted as a separate product from the physical Apple TV. The division here would be due to the fact that the App Store for an Apple TV is functionally very similar to the App Store's purpose on an iPhone.[207] It is used as the delivery distribution mechanism for curated Apps which the user

[201] *Apple TV*, APPLE (Last Accessed Feb. 19, 2021), https://www.apple.com/apple-tv-4k/
[202] *Purchase and download apps on Apple TV*, APPLE (Last Accessed Feb. 19, 2021), https://support.apple.com/guide/tv/purchase-and-download-apps-atvb8124f0a7/tvos
[203] Lauren Goode, *Too Embarrassed to Ask: What Is Apple TV, Anyway?*, VOX (Mar. 27, 2015), https://www.vox.com/2015/3/27/11560732/too-embarrassed-to-ask-what-is-apple-tv-anyway#:~:text=Apple%20TV%20is%20a%20%2469,a%20simple%20three%2Dbutton%20remote.
[204] *Id*.
[205] Sam Costello, Can You Install Apps on the Apple TV?, LIFEWIRE (Sept. 11, 2020), https://www.lifewire.com/can-you-install-apps-on-the-apple-tv-1999690
[206] Leo Kelion, Apple slashes commission fees to developers on its App Store, BBC (Nov. 18, 2020), https://www.bbc.com/news/technology-54985971
[207] See Apple, *supra* note 202

could use.[208] Although currently the App Store is the only method in which one can actually obtain Apps through the Apple TV, it is also quite plausible it imagine a scenario in which an Apple TV came with a multitude of App stores or came preinstalled with another option.

Where a product like an Apple TV crucially differs from something like an iPhone, however, is the level of utility and the variety of Apps actually available on the product. Currently, the Apple TV's App Store has a more limited range of apps[209], with a focus on Apps that provide streaming services. This limitation provides a crucial distinction between something like an Apple TV and an iPhone, particularly in how consumers are able weigh the technology when deciding to actually purchase the device.

The next step in this process would be to more closely examine the APIs available on the Apple TV as well as the restriction on their access in order to make a final determination as to the scope of the product. Unfortunately, there is not much literature on information which compares API access on something like an Apple TV with and iPhone. A more thorough examination would likely have to be conducted by a court, or someone more familiar with the technology. Still, the more limited scope of a streaming device such as this one makes it significantly easier for consumers to consider something like an Apple TV and its App Store as a single product, it may be more reasonable to not consider them to occupy "separate markets".

iii. Gaming Console/PlayStation 5 and PlayStation Store

The final product that exists in this a grey area with respect to restricted stores are gaming consoles. While this sort of examination could apply to any console, as they all have similar

[208] *Id*.

[209] *Apple TV apps Statistics and Trends 2021*, 42MATTERS (Last Accessed Feb. 19, 2021), https://42matters.com/tvos-apps-apple-tv-apps-statistics-and-trends (App store only has 13,600 Apps compared to the iPhone's almost 2 million); Statista, *supra* note 189

exclusivity regarding their online stores, uses, and charge similar commission fees, this example will look specifically at the Playstation 4 and 5,[210] which are some of the more popular consoles on the market.[211]

As their name implies, gaming consoles are created for a relatively limited purpose: playing video games. For the most part, they are not very portable and meant to be used at home.[212] In addition to their ability to play games, however, these consoles to provide a couple of other uses, such as the ability to play DVDs, use other web apps such as an internet browser, and some include apps to provide streaming services such as Netflix and Hulu.[213] Also like the Apple TV, gaming consoles only provide one storefront through which users can actually purchase software through. In Sony's case, this is the Sony PlayStation Store.[214] They also charge a similar commission fee to which Apple charges through its App Store, 30%, but do not charge an additional commission fee for in app purchases.[215]

Much like the Apple TV, gaming consoles also have reasons to want to limit what is available on their storefront aside from wanting to monopolize their devices. Gaming consoles only have limited processing power and compatibility with software compared to something like a PC or even an iPhone,[216] so it makes sense why console creators may want to restrict access to software which may push the console to its limits or otherwise break it. Console developers may

[210] PlayStation 5, SONY (Last Accessed Feb. 19, 2021), https://www.playstation.com/en-us/ps5/
[211] Steve Dent, *Sony's PS4 is the second best-selling console of all time*, ENDGADGET (Oct. 30, 2019), https://www.engadget.com/2019-10-30-sony-earnings-ps4-console-sales.html?
[212] Goode, *supra* note 69 (General discussion on how an Apple TV is used).
[213] David Carnoy, *PS4: Everything you need to know*, CNET (Nov. 4, 2013), https://www.cnet.com/news/ps4-everything-you-need-to-know/
[214] *Playstation Store*, SONY (Last Accessed Feb. 20, 2021), https://store.playstation.com/en-us/latest
[215] JONATHAN BORCK, JULIETTE CAMINADE, MARKUS VON WARTBURG, APPLE'S APP STORE AND OTHER DIGITAL MARKETPLACES: A COMPARISON OF COMMISSION RATES 6-7 (2020)
[216] *PS4 vs. Desktop PC for Gaming: Which is Superior?*, DIGITAL INFORMATION WORLD (Dec. 16, 2019), https://www.digitalinformationworld.com/2019/12/ps4-vs-desktop-pc-for-gaming-which-is-superior.html#:~:text=A%20PC%20has%20more%20storage,purchasing%20a%20quality%20gaming%20PC.

also want to limit what is available in their storefronts due to the exclusivity of certain games. Many consoles compete specifically on what games or available on each platform,[217] with each console often buying exclusivity rights to games they do not develop themselves in order to bolster sales on their own devices.[218] If developers or competitors were able to place their own stores on their consoles, the power some of these console developers have over control of exclusive products would be lost.

As another example of an online market, something like the PlayStation Store may also fail the traditional "separate markets" test used under Jefferson Parish. Although the actual software used to run PlayStation games could be seen as an essential part of the final product, as something needs to be made that actually runs the games,[219] nothing requires the device to be tethered to a specific online store. Console developers would likely claim that store exclusivity is necessary in order to maintain and manage what games are available on their consoles.[220] At the same time, one could also reasonably imagine a situation in which multiple game stores would be available on a singular console.[221] Regardless, the fact that one can reasonably separate these two products from one another should serve as enough of an indication that they do in fact constitute separate markets.

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[217] Kirk Hamilton, What A Video Game 'Exclusive' Means In 2017, KOTAKU (Jun. 12, 2017), https://kotaku.com/what-a-video-game-exclusive-means-in-2017-1796024566; Chaim Gartenberg, The Xbox One is struggling because video game exclusives still matter, THE VERGE (Mar. 22, 2017), https://www.theverge.com/2017/3/22/15010540/video-game-exclusives-ps4-xbox-one-switch-zelda-horizon-scorpio-first-party

[218] Andy Hartup, *Paying for exclusivity - why its here to stay*, GAMES RADAR (Jun. 6, 2013), https://www.gamesradar.com/paying-exclusivity-why-its-here-stay/

[219] For information on the software running in a PlayStation 4, *see* Richard Leadbetter, *Inside Playstation 4*, EUROGAMER (Mar. 28, 2013) https://www.eurogamer.net/articles/digitalfoundry-inside-playstation-4; Michael Larabel, *Sony's PlayStation 4 Is Running Modified FreeBSD 9*, PHORONIX (Jun. 23, 2013), https://www.phoronix.com/scan.php?page=news_item&px=MTM5NDI; *PlayStation®4 System Software Update*, SONY (Last Accessed: Feb. 20, 2021), https://www.playstation.com/en-us/support/hardware/ps4/system-software/

[220] Haeyop Song, Jaemin Jung, Daegon Cho, Platform Competition in the Video Game Console Industry: Impacts of Software Quality and Exclusivity on Market Share, 30 J Media Econ 99, 107-108 (2017); Hamilton, *supra* note 217

[221] In fact, Apple themselves brought up the potential of this kind of situation in their answer to Epic's complaint. Answer to Complaint, *supra* note 142 at 19-20

The tricky question for courts to answer under this test would be whether or not the actual variability and utility of gaming consoles actually necessitates a determination that their online stores actually constitute a separate product. On one hand, gaming consoles like the PS5 are put to a relatively limited use – playing video games. On the other hand, as time has gone on, these gaming consoles have offered more features to their users[222]. It is certain may be plausible that in the future gaming consoles could be open to an even wider variety of uses, much like a modern smartphone is.

Still, with the way that the PlayStation operates currently, it still may not offer such utility and versatility such that consumers would prefer that alternate stores be offered. Customers typically buy gaming consoles like the PS4 and PS5 to play the games available on them,[223] not because they have additional access to streaming services. Unlike something like an iPhone, which does market the variety of apps and uses of a smartphone,[224] PS5 advertising is

[222] Currently, the PS5 not only gives users the option to play PS5 games, but also allows users to play DVDs and download certain streaming services such as Netflix and Hulu which users can use to watch and stream videos. *PS4 entertainment*, SONY (Last Accessed Feb. 20, 2020), https://www.playstation.com/en-us/ps4/ps4-entertainment/

[223] Nielson published a study polling the top reasons for why people bought a specific console. Although the PS4's Blu-Ray player made it into their Top 5, all four other reasons, including the top one, related to the console's ability to play games. Nicole Pike, *NO STRANGER TO THE (VIDEO) GAME: MOST EIGHTH GEN GAMERS HAVE PREVIOUSLY OWNED CONSOLES*, NIELSEN (Feb. 23, 2015), https://www.nielsen.com/us/en/insights/article/2015/no-stranger-to-the-video-game-most-eighth-generation-gamers-have-previously-owned-consoles/

[224] Jaykishan Panchal, *Taking a Look at the Most Recent iPhone Launch and Its Marketing Campaign*, MARTECHSERIES (Oct. 17, 2019) https://martechseries.com/mts-insights/guest-authors/taking-a-look-at-the-most-recent-iphone-launch-and-its-marketing-campaign/ (Discussing how Apple advertises different aspects of an iPhone to reach different target audiences); *Please, stop with the "app for that"*, CBS NEWS (Jun 1, 2014), https://www.cbsnews.com/news/please-stop-with-the-app-for-that/ (Discussing Apple's marketing slogan "There's an App for that")

primarily focused on the games available on the store.[225] As a result, consumers tend to take the limitations of what is available on each console into account before purchasing them.[226]

This is consistent with the API limitations that are present on a PS5. The PS5 creates some of their core APIS with the end goal of making development of games easier.[227] This does support a conclusion that something like the PS5 is more oriented towards playing video games, rather than serving as an all-purpose product. Still, courts one would need more information on the APIs available, how restricted developers and users are from changing them, and what purpose they indicate overall before making a final determination as to the scope of a PS5.

D. Conclusion:

The decision by the DC Circuit in US. v. Microsoft to move from a Per Se standard to the Rule of Reason when addressing tying claims has provided some benefits to the technology industry. Namely, it gave a novel industry a chance to expand and tie together different software and markets in order to facilitate development.[228] At the same time, allowing for such expansive tying to occur has allowed for some firms to abuse the power they have in the market to charge supra-competitive prices and made it unclear when a technology firm may fall afoul of antitrust

[225] Lara O'Reilly, *PS4 could offer first of its kind advertising*, MARKETING WEEK (Feb. 22, 2013), https://www.marketingweek.com/ps4-could-offer-first-of-its-kind-advertising/; Jeff Beer, *Sony Playstation's "Greatness Awaits" Ad Strategy Keeps Aiming For Gamers' Hearts*, FAST COMPANY (Nov. 28, 2016), https://www.fastcompany.com/3065992/sony-playstations-greatness-awaits-ad-strategy-keeps-aiming-for-gamers-hear

[226] Pike, *supra* note 223 (Polling the factors consumers took into account when buying a console); Nick Summers, *How to choose a next-gen game console*, ENGADGET (Nov. 9, 2020), https://www.engadget.com/game-console-buying-guide-sony-playstation-5-microsoft-xbox-series-x-xbox-series-s-143039876.html (Example of a console buying guide, showing what factors may matter to those purchasing a console).

[227] Derek Strickland, *PlayStation 5 is easier to make games for, devs having issues on Xbox*, TWEAKTOWN (Sept. 19, 2020), https://www.tweaktown.com/news/75258/playstation-5-is-easier-to-make-games-for-devs-having-issues-on-xbox/index.html

[228] Beschle, *supra* note 1 at 473-475 (Discussing leniency of the Rule of Reason)

laws. This problem has festered into the litany of cases which have occurred in the past year regarding these tying practices.[229]

A move away from the Rule of Reason towards more Per Se liability could help remedy the situation. A Per Se rule could provide stricter protection and enforcement against potential marketplace abuses.[230] In addition, a bright line rule would make it easier for firms to know when they may be running afoul of antitrust laws. Although the traditional Per Se standard outlined in *Jefferson Parish* may not be the most appropriate way to evaluate technology markets, I believe that a new test utilizing proxy variables like APIs could be helpful in evaluating when an online market is truly "separate" from the software it operates on. By applying this test to three products that would be in a "grey area" under the current rule of reason standard, one can see that such a test may provide use to courts as well.

[229] *See* Part II, Section B-iii
[230] Ahlborn, *supra* note 5 at 296-301 (Discussing the reasons for a move from a strict Per Se to a modified Per Se approach)

Applicant Details

First Name	**Christopher**
Last Name	**Roberson**
Citizenship Status	**U. S. Citizen**
Email Address	**chris.roberson@richmond.edu**
Address	**Address** Street **12213 Manders Knoll Terrace** City **Midlothian** State/Territory **Virginia** Zip **23114** Country **United States**
Contact Phone Number	**8043328515**

Applicant Education

BA/BS From	**Princeton University**
Date of BA/BS	**June 2008**
JD/LLB From	**University of Richmond School of Law** **http://www.nalplawschoolsonline.org/content/OrganizationalSnapshots/OrgSnapshot_235.pdf**
Date of JD/LLB	**June 15, 2021**
Class Rank	**50%**
Law Review/ Journal	**Yes**
Journal(s)	**Public Interest Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Melton, Leigh
lmelton@richmond.edu
Ricks, Dean
dean.ricks@vadoc.virginia.gov
McCord, Ryan
ryan.mccord@vadoc.virginia.gov

References

Most Recent References:
1. Dean Ricks
Administrative Compliance Director
Virginia Department of Corrections
Phone: (804) 887-8083
Email: dean.ricks@vadoc.virginia.gov

2. Leigh Melton
Visiting Professor
University of Richmond
Email: lmelton@richmond.edu

3. Ryan McCord
Legal Compliance Manager / Legislative Team
Virginia Department of Corrections
Phone: (804) 887-8340
Email: ryan.mccord@vadoc.virginia.gov

More Available Upon Request

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Christopher W. Roberson
12213 Manders Knoll Terrace
Richmond, Virginia 23114

August 31, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a member of the class of 2021 at the University of Richmond School of Law. After six years as an educator, I am beginning a new career in law, and I am very interested in the law clerk position with the Eastern District of Virginia.

As a law clerk for the District Court, I would be able to utilize my recent legal experience at the Virginia Department of Corrections (DOC) to assist the court. During my internship at the DOC, I spent much of my time researching legal issues and case law to help the department stay compliant with existing and emerging legal standards. I would present my findings in written memoranda, and I never missed a deadline. I also researched court decisions and wrote new operating procedures which balanced departmental goals with legal standards. Additionally, this past summer I worked for a small estate planning firm where I researched tax code changes, wrote recommendations for necessary changes to be made in that firm's practices, and counseled clients regarding such changes to their plan. As a former English and writing teacher in both Beijing, China and Virginia, I have professional communication skills which help me convey information clearly and concisely to audiences of all backgrounds. I bring hard work and dedication to every venture which I undertake, and I know I can be a useful asset to the court.

I would appreciate the opportunity to discuss employment with the District Court for the Eastern District of Virginia with you during an interview. The opportunity to begin my legal career in a District Court while staying in my hometown, close to family, would be truly invaluable. Thank you for your time and consideration.

Sincerely,

Christopher W. Roberson
Enclosure

Christopher W. Roberson

12213 Manders Knoll Terrace
Midlothian, Virginia
chris.roberson@richmond.edu
804-332-8515

EDUCATION

University of Richmond School of Law — **Richmond, VA**
Candidate for Juris Doctor — May 2021

- GPA: 3.48
- Manuscript Editor, Public Interest Law Review
- Board Member, Competitive Client Negotiation
- Law Student Advisor for incoming students

Princeton University — **Princeton, NJ**
B.A. in English — June 2008

- Varsity Track

EXPERIENCE

Victoria J. Roberson, PLC — **Richmond, VA**
Summer Associate — May 2020-Current

- Drafted estate planning documents, including POAs, AMDs, Wills, Deeds, and Trusts, using a document assembly program to help tailor forms to individual client requests and goals.
- Researched recent tax code changes from the SECURE act and provided recommendations for trusts.
- Edited and assisted with publication materials for state level publications.
- Led client intake and final document review and answered client questions at both stages.
- Administered estates, including qualification, inventory, accounting, and estate closure.
- Navigated small, independent firm business practices, workflow, and administrative management.

Virginia Department of Corrections — **Richmond, VA**
Legal Compliance Intern, Administrative Compliance Unit — May 2019 – Current

- Researched legal topics and wrote memoranda to convey findings and recommendations.
- Rewrote internal operating procedures to comply with existing and evolving legal standards.
- Monitored new case law in order to evaluate and update departmental practice.
- Evaluated all outstanding department contracts to improve fiscal efficiency for the agency.
- Led presentations to and engaged with various committees to inform, collaborate, and find solutions.
- Managed multiple ongoing projects while collaborating with attorneys and subject matter experts.

Providence Middle School, Chesterfield County Public Schools — **Richmond, VA**
English Teacher, Grades 6 and 8 — August 2016 – June 2018

- Created and presented informative and engaging lessons for students from a variety of backgrounds.
- Met and surpassed performance goals and professional growth goals at the county and school level.
- Completed weekly and monthly tasks, including student performance analysis, progress reporting, student trajectory plans, parent communication, and lesson materials.
- Elected to Providence Leadership Team. Led 8th grade team and English grade level meetings.
- Assistant coach for Track and Field and mentor for Boys Bound for Success program.

The High School Attached to Capital Normal University — **Beijing, China**
English Literature Teacher — September 2013 – June 2016

- Helped develop curriculum with a partner program from German Town Academy (Philadelphia, PA).
- Developed plans as an introduction to Western Literature in order to meet institution goals.
- Responsible both for academic teaching as well as improving life-skills of students, such as time management and mindfulness.

Christopher Roberson
University of Richmond School of Law
Cumulative GPA: 3.48

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
CIVIL PROCEDURE	WILLIAMS	B+	13.2	
CONTRACTS	FRISCH	B+	13.2	
LEGAL ANALYSIS & WRITING	SUDDARTH	B+	6.6	
LEGAL RESEARCH	SCHILLER	E	-	Grade assigned in Spring Semester
TORTS	TOBIAS	A-	14.8	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
CONSTITUTIONAL LAW	WALSH	A-	14.8	
CRIMINAL LAW	CRANE	B+	9.9	
LEGAL ANALYSIS & WRITING	SUDDARTH	B+	6.6	
LEGAL RESEARCH II	SCHILLER	B+	3.3	
LEGISLATION AND REGULATIOIN	HOLDERNESS	B	9	
PROPERTY	OSENGA	A-	14.8	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
BUSINESS ASSOCIATIONS	LIN	A-	14.8	
EVIDENCE	COLLINS	P	-	B+ AND FULL CREDIT, ELECTED TO DROP GRADE
FEDERAL INCOME TAXATION	SCHAFFA	A-	14.8	
TRIAL ADVOCACY	TRACY	P	-	GRADED P/F

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
CONTRACT DRAFTING	LAUGHTER	CR		
ESTE AND GIFT TAXATION	CHARLES	CR		
INTERVIEW/NEGOTIATION/ COUNSELING	MELTON	CR		
PARTNERSHIP TAXATION	NEAL	CR		
WILLS AND TRUSTS	TAIT	CR		

ALL COURSES GRADED CREDIT/NO CREDIT DUE TO CORONAVIRUS RESPONSE.

Fal 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
AGING/DISABILITY LAW PRACTICUM	MELTON			
DIVERSITY IN EDUCATION AND EMPLOYMENT	WOODSON			
PRE-TRIAL LITIGATION SKILLS	MCBETH			
PROFESSIONAL RESPONSIBILITY	JANTO			
VIRGINIA PROCEDURE	BRYSON			

Spring 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
CORE COMMERCIAL CONCEPTS	EPSTEIN			
ENVIRONMENTAL LAW	SACHS			
LAW AND LITERATURE	SCHWARTZ			
REGULATORY LAW PRACTICUM	SACHS			
SECURITIES REGULATION	LIN			

Christopher Roberson
Princeton University
Cumulative GPA: 3.03

Summer 2004

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
The Language of Cinema		B	1	
Western Way of War		B	1	

Fall 2004

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intensive Beginner's French		B	1	
Introduction to Language and Linguistics		B-	1	
Six Degrees of Separation		B-	1	
Writing Seminary		B-	1	

Spring 2005

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
From Words to Idioms to Grammar		B	1	
Intermediate/Advanced French		B+	1	
Introduction to Psychologhy		C-	1	
Masterworks of European Literature		P	1	

Fall 2005

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Anthropology		B-	1	
Political Theory		B+		
Studies in French Language and Style		C	1	

Spring 2006

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Comparative Politics		B	1	
Modern American Drama		B	1	
Modern American Poetry		B+	1	
The Ideal of Democracy		B+	1	

Fall 2006

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Junior Independent Work		B+	1	
Junior Seminar in Critical Writing		B+	1	
Modernist Art: 1900-1950		B+	1	
Reading Literature: Fiction		B	1	
The Medieval Period		B	1	

Spring 2007

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to English Literature		B	1	
Junior Independent Work		B+	1	
Music and Physics		P	1	
Politics and Religion		B	1	
Shakespeare II		B+	1	

Fall 2007

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Literature: 1930-Present		A-	1	
Contemporary Art: 1950 to Now		B+	1	
Milton		A-	1	
The Later Romantics		B	1	

Spring 2008

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intertextuality and Shakespeare		B	1	
Intro History of Art		Audit	1	
Seminar: Contemporary Art		B+	1	
Senior Thesis		B+	2	

LEIGH ROBERTS MELTON
Visiting Professor of Law
University of Richmond School of Law
28 Westhampton Way
Richmond, Virginia 23173
410.829.6153

August 23, 2020

TO WHOM IT MAY CONCERN:

I am writing this letter in enthusiastic support of Chris Roberson's application for employment. I have gotten to know Chris over the past year, both as a student in my Interviewing, Negotiating and Counseling ("INC") course, a student in my Aging and Disability Law Practicum and as an active participant in law school governance. In all capacities, I have been most impressed with Mr. Roberson's talents, and I am confident that he will be an exceptional law clerk and an outstanding attorney.

In my INC class, Mr. Roberson stood out, from early in the course he was an unusually articulate and perceptive participant in class discussion. Repeatedly, he was the student who raised the serious and challenging issues that pushed the dialogue to a more reflective and perceptive level. His written work in the course, both a research memo and his final paper, simply confirmed what his class participation had already evidenced- that he was a student with exceptional insight and analytic skill, while also demonstrating the clarity and cogence of his prose style. Mr. Roberson was one of the strongest students in a strong class, and a review of his academic record reveals that his performance in INC was repeated across his other courses.

His talents, however, do not end there. Chris is also a person of unusual energy, maturity, and interpersonal skill. In addition to maintaining an outstanding academic record and working for the Virginia Department of Corrections, he has also managed to find time for other extra-curricular activities. He has been a Board Member of the Competitive Client Negotiation Board, a manuscript editor of the *Public Interest Law Review*, and advises incoming law students.

In short, I recommend Mr. Roberson to you strongly and without reservation. He will be a wonderful addition to your chambers or firm. If I can be of any further assistance in your review of his application, please feel free to contact me.

Sincerely,
Leigh R. Melton

Leigh R. Melton

COMMONWEALTH of VIRGINIA
Department of Corrections

HAROLD W. CLARKE
DIRECTOR

P. O. BOX 26963
RICHMOND, VIRGINIA 23261
(804) 674-3000

August 25, 2020

To whom it may concern,

I write to enthusiastically recommend Christopher Roberson for your Clerk position.

Chris has been working in my department as a legal compliance intern for over a year. Initially, Chris's employment was to be a summer internship. However, Chris quickly demonstrated his analytical abilities and overall efficiency. He took on more and more difficult tasks. Soon, he was an integral team member on multiple projects, including legal research, writing memoranda and recommendations, and leading presentations. We extended the invitation for Chris to stay with us at the end of summer, and he has repeatedly proven to be a reliable and diligent team member.

Most notable is Chris's exceptional writing ability. I have asked him to research a variety of topics for our legal team, and his written product is always clear, cogent, and accurate. I have used Chris's work for meetings with our executive team as well as consultations with the Attorney General's office.

Chris is punctual, effective, resourceful, and knowledgeable. He manages his workload excellently. He has a drive and a focus that help him stand out, and I confidently recommend Chris to be your clerk. As a dedicated employee and an all-around kind person, I know that he will be a beneficial addition to your court.

Feel free to contact me at (804) 887-8083 if you would like to discuss Chris's qualifications further.

Sincerely,

Dean W. Ricks
Director of Administrative Compliance
Virginia Department of Corrections

Administrative Compliance Unit
Virginia Department of Corrections
6900 Atmore Drive
Richmond, Virginia 23225

August 25, 2020

To whom it may concern,

I am writing you to effusively recommend Christopher Roberson for your clerk position.

Chris has been working under my direct supervision for over a year. I initially pulled him onto a project evaluating due process concerns in our facilities and procedures. While working together, Chris demonstrated a critical mind and an ability to digest new material and information quickly. I expanded his responsibilities and found I was able to trust Chris to assess information and situations correctly.

Chris has led training presentations for staff and prepared meetings for executive team members. He has written a variety of documents, from memorandum to operating procedures, and he has done so under time constraints without missing a deadline. Being an older law student, Chris has experience and maturity that shape his perspective, and I have come to value his opinion – both on legal issues and matters generally.

I cannot recommend Chris highly enough. He has been an outstanding intern, employee, and person in the time I've gotten to know him. I know that he will be a beneficial addition to your court should you choose him to be your clerk.

Please feel free to contact me at (804) 887-8340 should you like to discuss Chris's qualifications and experience further. I'd be happy to expand on my recommendation.

Sincerely,

Ryan Chase McCord

Ryan McCord
Legal Compliance Manager / Legislative Team
Virginia Department of Corrections

Christopher W. Roberson
12213 Manders Knoll Terrace
Midlothian, Virginia
chris.roberson@richmond.edu
804-332-8515

WRITING SAMPLE

This writing sample is a formal memo from my Legal Writing course. The premise for the assignment was to research and write to a partner about disclaimers used in the sales contract of our client, Best Manufacturing.

MEMORANDUM

To: Adele Kaufman
From: Christopher Roberson
Date: January 23, 2019
Re: New Client: Best Manufacturing, LLC (Case ID 012319) Disclaimer Assessment

I. Question Presented

Under New York's U.C.C. Law § 2-316 (McKinney 2018) regarding the exclusion of implied warranties, is a disclaimer sufficiently conspicuous to disclaim the implied warranties of merchantability and fitness of goods when it is on the second of three pages, the entire second page is boilerplate, it is the only provision in all capital lettering but is otherwise in the same small text, with no other notice provisions or a border calling attention to it, and there is another provision on the first page, in bold and all capital letters, surrounded by a border and highlighted with a place to initial acknowledgement?

II. Brief Answer

No, a court is not likely to find a disclaimer of the implied warranties of merchantability and fitness to be conspicuous when the disclaimer is on the second page, in all capitals with no other change to size, color, or font, with no other notice provisions calling attention to it, and other elements draw attention away. A disclaimer is conspicuous when it contrasts the surrounding text such that a reasonable person would notice it. A court will probably find the disclaimer not to contrast, thus not to be conspicuous, and we should encourage the client to make changes.

III. Statement of Facts

Our new client is New York based Best Manufacturing, LLC, ("Best") a manufacturer and seller of industrial metalworking equipment. Best is not in any legal jeopardy currently;

however, Best would like to include a provision in its Sales Agreement that disclaims the implied warranties of merchantability and fitness.

Best uses a standardized form ("Sales Agreement") as a stock contract for all major purchases. This agreement is three pages in length. Pages one and three provide particulars on the nature of the sale, with specific areas to initial (pages one and three) and sign (page three), and they are written in size twelve font. Page one also has a failure to close provision, which is five lines of all capital print with a bold heading, requires initialed acknowledgement, and is both located at the end of the page and surrounded in a bold outline. Page two, which appears on the reverse side of page one, is filled with boilerplate language written entirely in size eight font. Within the boilerplate language on page two, Best has a single line stating explicitly "**DISCLAIMER.** MAKES NO WARRANTY OF MERCHANTABILITY OF THE GOODS OR OF THE FITNESS OF THE GOODS FOR ANY PURPOSE". The disclaimer, enumerated as "B.4." under the "ADDITIONAL TERMS AND CONDITIONS" section, appears in the same size, color, and font (hereafter, collectively as "typeface") as the other text on that page. However, it is the only provision written in all capital letters. It does not appear with a border, nor does it have a notice provision on page one or page three.

IV. Discussion

New York implies the warranties of merchantability and fitness for a particular purpose to the sale of all goods within the state. N.Y. U.C.C. Law § 2-314, -15 (McKinney 2018). New York permits sellers to disclaim the implied warranties with a proper disclaimer provision. Id. § 2-316. Specifically, New York requires that language to disclaim the implied warranties must mention the relevant term merchantability, be a writing, and be conspicuous. *Id*. Here, the

disclaimer mentions the relevant term and is in writing, so the only outstanding element we must resolve for our client is whether the disclaimer is conspicuous.

A. Conspicuous Disclaimer

A court is likely to find Best's disclaimer is not sufficient to disclaim the implied warranty of merchantability and fitness of goods because it is not conspicuous. New York defines conspicuous as any writing or text feature that "a reasonable person … ought to have noticed." N.Y. U.C.C. Law § 1-201(b)(10) (McKinney 2018). A reasonable person ought to notice a writing when the provision contrasts the surrounding text. *See Travelers Ins. Cos. v. Howard E. Conrad, Inc.*, 649 N.Y.S.2d 586, 587 (App. Div. 1996). Whether a provision contrasts is a matter for the court's discretion. N.Y. U.C.C. Law § 1-201 (McKinney 2018). The court bases its decision on a variety of factors, including location of the disclaimer, any differences in the typeface from the surrounding text, the existence of other notice provisions calling attention to the disclaimer, if there is a border, and/or if there are other elements that contrast more than the disclaimer. *See Travelers*, 649 N.Y.S.2d at 586, 587 (capital lettering, notice provisions); *Con Tel Credit Corp. v. Mr. Jay Appliances & TV, Inc.*, 513 N.Y.S.2d 166, 167 (App. Div. 1987) (bold text, location); *Commercial Credit Corp. v. CYC Realty, Inc.*, 477 N.Y.S.2d 842, 844 (App. Div. 1984) (bold text, no boilerplate); *Victor v. Mammana*, 422 N.Y.S.2d 350, 351 (Sup. Ct. 1979) (text size, border).

For example, in *Travelers Insurance Cos. v. Howard E. Conrad, Inc.*, 649 N.Y.S.2d 586, 587 (App. Div. 1996), the court found the disclaimer contrasted when it was on the back of the document, appeared in all capital letters larger than any other text on that page, and had two additional notice provisions on the front directing the reader to the disclaimer. Similarly, in *Con Tel Credit Corp. v. Mr. Jay Appliances & TV, Inc.*, 513 N.Y.S.2d 166, 167 (App. Div. 1987), the

court held a disclaimer contrasted when it was on the front of the contract, above the signature area and not with the boilerplate language on page two, and the text was the only provision in bold. Lastly, the court in *Commercial Credit Corp. v. CYC Realty, Inc.*, 477 N.Y.S.2d 842, 844 (App. Div. 1984) ruled that a disclaimer contrasted when it was the on the front page near the signature section, and it was the only bold print on that page.

In contrast, the court in *Mill Printing & Lithographing Corp. v. Solid Waste Management Systems, Inc.*, 409 N.Y.S.2d 257, 258 (App. Div. 1978) found a disclaimer did not contrast when it was the same typeface as the rest of the contract. Likewise, in *Lupa v. Jock's* 500 N.Y.S.2d 962, 963 (Oswego City Ct. 1986), the court ruled a disclaimer on the back did not contrast, even though it was in bold and had a "See Reverse" notice provision on the front, because the whole back was printed in light color and was difficult to read. Finally, in *Victor v. Mammana*, 422 N.Y.S.2d 350, 351 (Sup. Ct. 1979), the court held a disclaimer on a product label did not contrast when it was under a "WARRANTY" heading but the text was in the same small size as the other text and was not enclosed within a border. Moreover, both a danger warning and the product name were on the label as well, and they were "well-marked and highlighted," thus drawing more attention than the disclaimer. *Id*. at 351.

Best's disclaimer is on page two in the middle of the boilerplate language, far from both the initial provisions on pages one and three and the signature area on page three. It is the only sentence written in all capital letters, but it is otherwise in the same typeface as the rest of the text on the second page. It has no heading and no notice provisions calling attention to it and no border. Other elements seem to stand out more. For example, the "Failure to Close" is on the front page, has a bold heading, is in all caps, has a border, and requires initial acknowledgment.

Also, the "Description of the Goods" is in all caps, is at the top of the third page near the signatures, and requires the reader to write at length.

A court is likely to rule as it did in *Mill Printing*, 409 N.Y.S.2d at 258, *Lupa*, 500 N.Y.S.2d at 963, and *Victor*, 422 N.Y.S.2d at 351, that Best's disclaimer does not contrast with the surrounding text. In *Mill Printing* the court found the disclaimer did not contrast because it was in the same typeface. *Mill*, 409 N.Y.S.2d at 258. Similarly, Best's disclaimer, while in all capital letters, is otherwise in the same typeface as the rest of page two. Additionally, in *Lupa*, the court held that the disclaimer on the back did not contrast because, even though it was the only bold text and there was a notice provision on the front, the entire back was difficult to read due to the light print. *Lupa*, 500 N.Y.S.2d at 963. Best's disclaimer is similarly difficult to read because, while not light, it is in the same, small eight-point font as all of page two. Finally, in *Victor*, the court ruled the disclaimer did not contrast because it was on a label under a heading, but was otherwise in the same small typeface, was borderless, and other provisions stood out more. *Victor*, 422 N.Y.S.2d at 351. Similarly, in Best's agreement, the disclaimer is on the second page in the same typeface as the other text on the page (although in all capitals), is borderless, and other provisions - such as the "Failure to Close" and "Description of Goods" - stand out more than the surrounding text due to all capital typeface, a border, and signor acknowledgment.

A court is likely to find Best's disclaimer differs from the contrasting disclaimers in *Travelers*, 649 N.Y.S.2d at 587, *Commercial Credit*, 477 N.Y.S.2d at 844, and *Con Tel*, 513 N.Y.S.2d at 167. In *Travelers*, the disclaimer was found to contrast because, even though it was on the back, it was in all capitals, the typeface was larger, and it had two notice provisions calling attention to the disclaimer. *Travelers*, 649 N.Y.S.2d at 587. Best's disclaimer is on the

second page and is in all capitals, but it is in the same small size as the text on page two, and there are no notice provisions calling attention to the disclaimer. Further, unlike both *Commercial Credit* and *Con Tel*, where the disclaimer was on the front of the agreement, above signatures, and in bold print, Best's disclaimer is on the second page, within the boilerplate, not near the signatures, and not in bold print. *Commercial Credit*, 477 N.Y.S.2d at 844; *Con Tel*, 513 N.Y.S.2d at 167.

In sum, Best's disclaimer likely does not contrast due to its location on the second page, being in all capitals, but otherwise in the same small typeface as the rest of page two, its lack of a border or of notice provisions calling attention to the disclaimer, and the other sections which call attention away from the disclaimer. Since it likely does not contrast, a reasonable person would probably not notice it, and the disclaimer would be ruled not conspicuous.

V. Conclusion & Recommendations

Best's disclaimer is likely not legally enforceable in New York court. While the disclaimer does mention the warranty of merchantability explicitly, and it is also a writing (requirement two), a court is likely to find it is not conspicuous. Luckily, a few simple changes should put Best in a better position.

Best's disclaimer needs to be in a better location, like the front of the agreement or near the signatures. Best's disclaimer can remain in all capitals, but the typeface needs additional changes, like being bold or much larger, or both, ideally. Best should also put notice provisions on the front page or near the signature area on page three to call attention to the disclaimer. Lastly, Best needs to mitigate the attention being drawn away from the disclaimer, so any attention calling measures (like a border and initial acknowledgment) need to be solely relegated to the disclaimer statement, or at least duplicated for the disclaimer statement. Ideally, Best

would also remove the borders and signee writing areas for areas other than their disclaimer. With these simple changes, Best's disclaimer would likely be legally enforceable if challenged in court.

Christopher W. Roberson
12213 Manders Knoll Terrace
Midlothian, Virginia
chris.roberson@richmond.edu
804-332-8515

WRITING SAMPLE

This writing sample is more in line with an essay or issue research piece, but it does use legal citations. The premise for the assignment was to identify, unpack, and evaluate a famous negotiation that occurred. I chose Amazon's choice for new headquarters.

Chris Roberson
April 27, 2020
Interviewing, Negotiation, Counseling
Professor Melton

Assignment Two: Amazon HQ2

Introduction

In September 2017, the online vendor and global technology company Amazon announced it was going to create a second headquarters, known as HQ2. The news created quite a stir, and "more than 200 cities in Canada, Mexico, and the United States eventually offered tax breaks, expedited construction approvals, promises of infrastructure improvements, new crime-reduction programs, and other incentives."[1] Ultimately, Amazon chose to locate HQ2 in Crystal City, Virginia and New York, New York.

However, subsequent to that announcement, Amazon has withdrawn from New York and is now only building one HQ2 in Crystal City. How did a small, hitherto unknown city claim this massive economic prize when major cities around North America fell short? How was Virginia able to negotiate successfully? What did New York do wrong? This paper will unpack the events and negotiations between Amazon and these two cities/states to contrast Virginia's success with New York's failure.

Timeline and Events

Amazon announced its intent to build HQ2 in September 2017, saying that it would spend $5 billion on construction and would ultimately support 50,000 workers when completed.[2]

[1] Matt Day, *Amazon refuses Arizona's cactus as bidders for HQ2 climb to 118*, Seattle Times (Sept. 27, 2017), https://www.seattletimes.com/business/amazon/amazon-refuses-arizonas-cactus-as-bidders-for-hq2-climb-to-118/ (last visited April 22, 2020).
[2] Nick Wingfield and Patricia Cohen, *Amazon Plans Second Headquarters, Opening a Bidding War Among Cities*, The New York Times (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/technology/amazon-headquarters-north-america.html (last visited April 22, 2020).

The corporation invited governments and economic development organizations to give the corporation tax breaks and other incentives to entice it to their locality:

> It asked candidates to include in their bids a variety of detailed information, including potential building sites, crime and traffic stats and nearby recreational opportunities. Amazon also asked cities and states to describe the tax incentives available to offset its costs for building and operating its second headquarters.[3]

As of October 23, 2017, 238 proposals had been submitted and received by Amazon,[4] representing cities and regions from 54 states, provinces, districts, and territories. On January 18, 2018, a shortlist of 20 finalists was announced[5], after which the candidate localities continued to detail or expand their incentive packages. "The successful finalists appeared to sell Amazon on a winning combination of available talent (particularly in the software/IT space), infrastructure (otherwise adding 50,000 new employees could spell gridlock), community vibe (presumably one that jibes with its Pacific Northwest roots) and financial incentives."[6]

On November 13, 2018, Amazon announced that HQ2 would be split into two locations, with 25,000 workers at each: National Landing, a future neighborhood including Crystal City in Arlington, Virginia, and Long Island City in Queens, New York City. [7] The move surprised pundits, [8] since originally HQ2 was to create 50,000 jobs and be a full equal to its Seattle headquarters.

[3] Nick Wingfield, *Amazon Chooses 20 Finalists for Second Headquarters*, The New York Times (Jan. 18, 2018), (https://www.nytimes.com/2018/01/18/technology/amazon-finalists-headquarters.html (last visited April 22, 2020).
[4] Natalie Wong, *Amazon Receives 238 Proposals for HQ2 Across North America*, (October 23, 2017), https://www.bloomberg.com/news/articles/2017-10-23/amazon-receives-238-proposals-for-hq2-across-north-america (last visited April 22, 2020).
[5] Wingfield, *supra* note 3.
[6] Marco della Cava and Elizabeth Weise, *Amazon's second headquarters: The pros and cons of the finalists*, USA TODAY (Jan. 18, 2018), https://www.usatoday.com/story/tech/news/2018/01/18/amazons-second-headquarters-pros-and-cons-finalists/1041211001/ (last visited April 22, 2020)
[7] Laura Stevens, Keiko Morris, Katie Honan, *Amazon Picks New York City, Northern Virginia for Its HQ2 Locations*, The Wall Street Journal (Nov. 13, 2018), https://www.wsj.com/articles/amazon-chooses-new-york-city-and-northern-virginia-for-additional-headquarters-1542075336 (last visited April 22, 2020)
[8] Marcia Layton Turner, *Amazon Is Most Likely To Build Its Second Headquarters In One of These Five Cities*, Forbes (Oct. 19, 2017), https://www.forbes.com/sites/marciaturner/2017/10/19/amazon-is-most-likely-to-build-its-

However, the split was decided early in the process.[9] Since the bidding process completed, Amazon has revealed that "one of the main concerns about the process was how a city would navigate an influx of 50,000 new workers."[10] By splitting among two different cities, "Amazon avoid some of the blame for higher housing prices or more traffic in those regions."[11] Splitting also allow Amazon to ease issues related to housing and transit, problems which "have been highlighted at Amazon's main headquarters in Seattle, where locals complain of skyrocketing rents, prolonged construction, gentrification, and gridlock traffic."[12] Additionally, The move also allows Amazon to recruit top talent from two major Metropolitan areas.[13] While these factors were revealed only after Amazon decided, the hindsight provides an valuable lens in evaluating the negotiation strategies and tactics of Virginia and New York.

Ultimately, Virginia offered to provide $573 million in tax breaks, $23 million in cash, and other incentives.[14] The success of Virginia's Crystal City was unexpected, to say the least, and provides fascinating insight into Amazon's desired assets in the negotiations.

New York offered to give Amazon tax breaks of at least $1.525 billion, cash grants of $325 million, and other incentives.[15] However, in another twist, Amazon pulled out of the New York location just three months after accepting their bid, due to vocal opposition from some

second-headquarters-in-1-of-these-5-cities/#3f36c6cd6168 (last visited April 22, 2020); Matt McFarland, *8 cities fit for Amazon's second headquarters*, CNN (Sep. 11, 2017), https://money.cnn.com/2017/09/11/technology/amazon-cities/index.html (last visited April 22, 2020).

9 Mary Hanbury, *Amazon apparently knew for months that it would split up its second headquarters*, Bsuiness Insider (Nov. 15, 2018), https://www.businessinsider.com/amazon-decided-split-hq2-months-ago-2018-11 (last visited April 22, 2020).

10 Kaya Yurieff, *Amazon picks New York and Northern Virginia for its new headquarters after year-long search*, CNN Business (Nov. 13, 2018), https://www.cnn.com/2018/11/13/tech/amazon-hq2-nyc-arlington/index.html (last visited April 22, 2020).

11 *Id.*

12 Hanbury, *supra* note 9.

13 Hanbury, *supra* note 9.

14 The Mercury News (Nov. 13, 2018), https://www.mercurynews.com/2018/11/13/amazon-hq2-breaking-down-the-tax-breaks/ (last visited April 22, 2020).

15 *Id*.

residents and local politicians.[16] New York City's lost bid reveals even more about the negotiation. Considering the magnitude of the opportunity and the volume of interest, how did Virginia come out on top, and how did New York lose its bid?

Virginia's Success

Virginia offered performance-based incentives worth $573 million, and Arlington County would also give an additional $23 million in cash grants.[17] More importantly, Crystal City offered three non-monetary selling points in their deal which helped them stand out against cities and locales with more money, repute, or people.

Virginia negotiators were able to see beyond the basics of the expansion and understand what Amazon wanted. As Bill Ury states in his TEDx San Diego talk called "The Power of Listening," people "think of negotiation as being about talking, but in fact it's really about listening." [18] In this talk, he lays out three important reasons to listen: it helps one understand the other side, helps one connect with other human beings, and it makes more likely others listen to the listener."[19] This is done, he states, by "focus[ing] on the other, focus[ing] on what's not said."[20] Virginia negotiators were able to see past the position, focus on the other (Amazon)[21], and correctly identify Amazon's desires. Specifically, Virginia negotiators and economists realized the biggest advantage of Crystal City was its highly educated workforce (a state

[16] Robert McCartney and Jonathan O'Connell, *Amazon Drops Plan For New York City Headquarters*, The Washington Post (February 14, 2019), https://www.washingtonpost.com/local/trafficandcommuting/amazon-drops-plan-to-build-headquarters-in-new-york-city/2019/02/14/b7457efa-3078-11e9-86ab-5d02109aeb01_story.html. (last visited Apr. 22, 2018).
[17] *Supra* note 15.
[18] William Ury, *The Power of Listening*, YouTube (Jan. 7, 2015), https://youtu.be/saXfavo1OQo (last visited Apr. 22, 2018).
[19] *Id*.
[20] *Id*.
[21] Roger Fisher and William Ury, *Getting to Yes: Negotiationg Agreement Without Giving In*, Penguin Group, 2011.

initiative they had been working on), its close proximity to Washington, and its capacity for expansion.

Northern Virginia was pitched as a "brain hub."[22] The final proposal "centered around an effort to provide Amazon… educated workers it needed."[23] While Virginia offered Amazon only $550 million in tax breaks, Virginia also pledged $1.1 billion to technical schooling from kindergarten through community colleges.[24] The state was purportedly the only place in the nation that made education the centerpiece of its pitch. [25]

By focusing on talent, Virginia Negotiators saw passed just the "sticker price" of the negotiation and identified what a business would want. In short, they focused on the other as Ury describes. The efficacy of their strategy cannot be overstated. Carney told CNN that "the talent was really the driving factor for [Amazon]."[26] Brian Huseman, Amazon's vice president for public policy, echoed those sentiments, telling CNBC that "tech talent was the biggest driving factor" in evaluating bids.[27]

Next, Virginia offered another important, intangible benefit. Recognizing that Amazon amassed a huge government-relations team, Virginia negotiators identified that Amazon might want a location near Washington, D.C.[28] Crystal City—right next door to the Pentagon—would allow Amazon employees to "become part of the Washington community, attending back-yard barbecues and school dance recitals with the very regulatory staffers and procurement officials

[22] Luke Mullins, The Real Story of How Virginia Won Amazon's HQ2, Washingtonian (Jun. 16, 2019), https://www.washingtonian.com/2019/06/16/the-real-story-of-how-virginia-won-amazon-hq2/ (last visited April 22, 2020).
[23] *Id.*
[24] *Id*.
[25] *Id.*
[26] Yurieff, *supra* note 10.
[27] Scott Cohn, Amazon reveals the truth on why it nixed New York and chose Virginia for its HQ2, CNBC (Jul. 10 2019), https://www.cnbc.com/2019/07/10/amazon-reveals-the-truth-on-why-it-nixed-ny-and-chose-virginia-for-hq2.html (last visited April 22, 2020).
[28] Mullins, *supra* note 22.

whose decisions will determine the company's future."[29] Again, an ability to mingle with government officials was not an overt request by Amazon, but rather it was something that Virginia negotiators were able to correctly identify as desirable when they focused on the other.

Finally, Virginia negotiators took a step back and listened to Amazon – and to what others were saying about it. Amazon transformed Seattle, but no longer do denizens of the city look fondly upon the tech giant.[30] Due to a rise traffic, rent prices, cost of living, and general congestion, Seattle residents have soured on Amazon over time.[31] Amazon, Virginia negotiators thought, might want to avoid a larger city where they would potentially replicate the spikes in traffic, rent prices, and congestion. Instead, Amazon might want a city it could build from the ground up to assuage those problems. Crystal City offered that, and, indeed, Amazon and Virginia are already dramatically renovating the city [32].

The ability of Virginia to identify Amazon's real interests and package them into Virginia's bid also demonstrates Margaret Neale's idea, as she describes it, in "Negotiation: Getting What You Want."[33] Other states, some of which offered up to $7 Billion in incentives, were viewing the bids as adversarial, trying simply to reach a little further past the others, yet Virginia negotiators showed an ability to "mov[e] from adversarial to problem solving."[34] "The goal of a negotiation is not to get a deal, the goal of a negotiation is to get a good deal," Neale says. Virginia, unlike other cities or states, offered the best deal – a pipeline of talent and highly

[29] Mullins, supra note 22.
[30] Drew Atkins, *How Amazon earned Seattle's scorn — and whether it's deserved*, Crosscut (Oct. 29, 2017), https://crosscut.com/2017/10/amazon-hq2-seattle-culture-philanthropy-stingy-business (last visited April 22, 2020).
[31] *Id.*
[32] *Demolition Underway on Amazon Buildings in Crystal CityARLnow*.com (Mar. 25, 2019), https://www.arlnow.com/2019/03/25/demolition-underway-on-amazon-buildings-in-crystal-city/ (last visited April 22, 2020).
[33] Margaret Neale, *Negotiation: Getting What You Want*, YouTube (Mar. 13, 2013), https://youtu.be/MXFpOWDAhvM (last visited April 22, 2020).
[34] *Id.*

educated workers, easy access to government workers, and a new city to build from the ground up (to rectify and/or counter Amazon's poor reputation vis-à-vis Seattle[35]), despite only offering (relatively) modest monetary assets. Virginia sought not to compete, but to solve a problem. It answered the question "What does Amazon want?"

New York's Failure

New York offered Amazon performance-based direct incentives of $1.525 billion, and millions more based on occupancy and job creation.[36] Additionally, Amazon chose New York City as one of the sites for HQ2 because of the city's highly skilled pool of talent, from existing tech, finance, and media industries, as well as strong universities such as Columbia University and Cornell Tech.[37] Yet, while New York was able to reproduce some of Virginia's successful tactics, it ultimately failed for a few reasons.

First, New York forgot about the third side. As Bill Ury explains in "The Walk from 'No' to 'Yes,'" "there is always a third side," a side that encompasses the two sides of the negotiation.[38] He highlights that the third side, community, can play a powerful role in a negotiation.[39] In regards to HQ2, bad press and scrutiny from the community were powerful enough to end a major business development plan.

[35] Paul Roberts, *This Is What Really Happens When Amazon Comes to Your Town*, Politico Magazine (Oct. 19, 2017), https://www.politico.com/magazine/story/2017/10/19/amazon-headquarters-seattle-215725 (last visited April 22, 2020).
[36] *Supra* note 15.
[37] Alex Hickey, *Strong university ecosystems feed Amazon HQ2 fire*, CIODIVE (Nov. 13, 2018), https://www.ciodive.com/news/strong-university-ecosystems-feed-amazon-hq2-fire/542160/ (last visited April 22, 2020).
[38] William Ury, *The Walk From "No" to "Yes*," YouTube (Dec 1. 2010), https://www.youtube.com/watch?v=Hc6yi_FtoNo&feature=youtu.be (last visited April 22, 2020).
[39] *Id*.

After the HQ2 campus in New York City was announced, politicians, officials, and public figures denounced the plan.[40] They voiced concerns about the damage to small businesses and rising rent prices, and generally disapproved of the "sticker price" of tax rebates which could be allocated elsewhere.[41] As a result of this backlash, Amazon announced in February 2019 that it would cancel the location due to opposition.[42]

Interestingly, New York Governor Andrew Cuomo tried to "go to the balcony" - Ury's idea of getting a new perspective to re-focus or re-orient a negotiation.[43] Governor Cuomo tried to get Amazon to reconsider. He phoned multiple executives and even owner Jeff Bezos.[44] However, this tactic did not succeed, mainly due to New York's second mistake.

Nick Coburn-Palo, in his TEDx talk in Taipei, addresses why some negotiations fail.[45] He highlights the "failure to build relationships" as one of the major reasons.[46] As he describes it, a negotiation should not disrupt the working relationships going forward. To put it differently, after a negotiation concludes, the parties still exist, and they will likely work together going forward. As such, no negotiation should disrupt that working relationships. In New York, the critiques of the community (the 18th camel) soured the relationship. Knowing that Amazon does

[40] *Some Queens Pols Pushback Against HQ2 Coming To LIC*, Queens County Politics (Nov. 14, 2018), https://www.queenscountypolitics.com/2018/11/13/some-queens-pols-pushback-against-hq2-coming-to-lic/ (last visited April 22, 2020).
[41] Tanay Warerkar, *Queens officials come out against Amazon's HQ2 in Long Island City*, Cubed New York (Nov. 13, 2018), https://ny.curbed.com/2018/11/13/18090668/amazon-hq2-long-island-city-opposition-nyc (last visited April 22, 2020).
[42] Dylan Byers, *'That's pretty firm': Why Amazon is done negotiating with New York*, NBC News (Feb. 14, 2019), https://www.nbcnews.com/business/business-news/it-wasn-t-any-one-incident-amazon-rep-says-decision-n971831 (last visited April 22, 2020).
[43] Ury, *supra* note 38.
[44] J. David Goodman, *Andrew Cuomo Speaks With Jeff Bezos, Hints of 'Other Ways' to Clear Path for Amazon's Return*, The New York Times (Feb. 28, 2019), https://www.nytimes.com/2019/02/28/nyregion/amazon-hq2-nyc.html (last visited April 22, 2020).
[45] Nick Coburn-Palo, *Why Negotiations Fail*, YouTube (May 1, 2015), https://youtu.be/DC_ebaS6LaA (last visited April 22, 2020).
[46] *Id*.

not want a community to scorn Amazon again (like Seattle), this soured relationship was a major element in New York losing it HQ2 bid.

Baked into this failure to build a relationship is a final fault on New York's part. In his TEDx talk "The Secretes of Hostage Negotiators," Scott Tilema talks about the power of respect.[47] He points out that on the other side is someone who does not "want to feel stupid or be embarrassed."[48] Whether for political points or justifiable ethics, the commentators from New York city eroded respect toward Amazon. This disrespect, coupled with Amazon's heightened sensitivity towards its reputation, was enough to tip the scales and have Amazon pull out immediately and definitely.

Conclusion

Ultimately, Virginia negotiators focused on what Amazon might want, and correctly identified the issues involved. As a result, their bid won the economic prize of the decade because it focused on a highly skilled workforce, proximity to Washington, D.C., and an opportunity to improve reputation. While New York's offer mirrored some of these aspects, the state ruined its chances because it overlooked its community and was disrespectful to Amazon. These two issues were more important to Amazon than its negotiators realized, and their failure to predict or sidestep them resulted in the major economic blunder of the decade.

[47] Scott Tilema, *The Secrets of Hostage Negotiators* YouTube (Dec. 6, 2016) https://youtu.be/4CNRmhleJmk (last visited April 22, 2020).
[48] *Id.*

Applicant Details

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Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
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Moot Court Name(s)	

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April 5, 2021

The Honorable Elizabeth W. Hanes
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am a legal fellow at the National Women's Law Center and recent graduate of the University of California, Berkeley, School of Law. I am writing to apply to a clerkship in your chambers for the 2022-23 term. As an aspiring impact litigator and scholar, clerking in your chambers would be an ideal opportunity for me.

In my current role, I provide legal analysis for state partners, focusing on Southern states, including West Virginia, Louisiana, Florida and Texas. This experience makes me uniquely capable to understand and analyze both state and federal laws in a broad range of issue areas, including medical malpractice, state constitutional law, and legislative interpretation. Prior to my fellowship, I interned at several civil rights organizations, where I assisted clients with legal research, including drafting amicus briefs, representing clients in administrative hearings, and investigating novel litigation strategies.

I am also very interested and familiar with legal scholarship, as I hope to become a constitutional law scholar. As you will see from my resume, I have excelled at writing courses, notably earning an American Jurisprudence Award for my paper in Professors Haney-Lopez' and Abrams' writing workshop, which was later published in Berkeley's La Raza Law Journal. This clerkship would be a critical step towards this goal, and will allow me to learn from experienced litigators and distinguished judges.

I am excited to be considered for this position and eager for a chance to be interviewed in your chambers. Enclosed you will find my resume, a writing sample, and recommendation letters from Professor Ian Haney Lopez (510-643-2669 and ihl@berkeley.edu), Professor Katherine Abrams (510-643-6355 and krabrams@berkeley.edu), and Noel Léon (501-519-3787 and noel.ruth.leon@gmail.com). All of my recommenders are happy to speak about my candidacy via email or phone. Please let me know if you need any additional information. Thank you for your time and consideration.

Sincerely,
Anna Rodriguez

Anna Rodriguez

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EDUCATION

University of California-Berkeley Law School, Berkeley, CA
J.D., May 2020

Honors: California Bar Foundation 1L Diversity Scholarship Recipient (2017)
San Francisco Bar Justice & Diversity Minority Law Student Recipient (2017-2020)
Honorable Cruz Reynoso Fellowship Recipient (2018, 2019)
Jurisprudence Award (First in Class) for Writing Workshop: Law, Inequity and Social Change (Professors Haney-Lopez and Abrams)
Berkeley Law Public Interest Fellowship Recipient (2020-2021)

Activities: La Raza Law Students Association, 1L Representative (2017)
Berkeley La Raza Law Journal, Symposium Editor (2018-2019)
If/When/How: Lawyering for Reproductive Justice, Chapter President (2018-2019)
Reproductive Justice Project, Student-Lead Pro-Bono Project Leader (2018-2019)
Women of Color Collective, Faculty Recruitment & Retention Chair (2018-2019)
Student Association at Berkeley Law, 2L Representative (2018-2019)

New College of Florida, Sarasota, FL
B.A., Anthropology, May 2016

Senior Thesis: "The Things We Cannot Say: Sharing Abortion Stories from the Margins," focusing on online abortion narrative and political rhetoric in the U.S.

EXPERIENCE

Legal Volunteer, **D.C. Volunteer Lawyers Project**, D. C. Dec. 2020–Present
Assisting domestic violence survivors with protection orders, negotiations and custody matters.

Legal Fellow, **National Women's Law Center**, Washington, D.C. Sep. 2020–Present
Leading the Abortion Rights Project, a new initiative to connect non-traditional partners to broader abortion rights work. Monitoring state legislative calendars, facilitating cross-issue advocacy, and supporting impact litigation and policy initiatives.

Reproductive Rights & Health Legal Intern, **National Women's Law Center**, D.C. May–Aug. 2019
Wrote legal memoranda, researched state and federal legislation, and led broad coalition efforts in reproductive rights. Worked on rapid-response research and outreach, analyzing legislative and administrative policies which impact women's rights.

Legal Fellow, Project Lead, **Cambridge Reproductive Health Consultants** Mar. 2019–May 2020
Lead a team of three legal researchers as part of a consultant team to a nonprofit client. Focused on state research of telemedicine laws and regulations, conducted weekly check-in meetings, and edited memorandums for project deliverables.

Reproductive Health & Gender Equity Legal Intern, **ACLU of Northern California** Jan.–May 2019
Planned and executed campaigns addressing sexual education, reproductive health access for incarcerated women and religious refusals in the healthcare setting. Conducted legal research, developed communications strategies, and engaged in community organizing.

Legal Intern, **East Bay Community Law Center,** Berkeley, CA Aug.–Dec. 2018
Wrote claimant statements, represented clients in administrative law hearings and worked directly with clients on public benefits, housing, and immigration issues.

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Researcher, **Office of Public Defense Services**, Salem, OR Aug.–Dec.2018
Assisted capital post-conviction relief team with legal research to prepare a comprehensive challenge to Oregon's capital sentencing scheme.

Summer Clerk, **Equal Justice Society,** Oakland, CA May–July 2018
Wrote legal memoranda, assisted in case and client management and facilitated community meetings to develop new cases. Worked on cases involving discrimination in education, police brutality and industry-wide discrimination.

Communications Fellow, **Conway Strategic,** Washington, DC
Jan.–July 2017
Worked with reproductive justice and LGBTQ organizations as a consultant on earned and social media, message development, and polling. Launched innovative campaigns, drafted media pitches and opinion editorials, and created a post-election analysis for abortion opinions.

Organizer, **Community Outreach Group**, Des Moines, IA Sep.–Dec. 2016
Lead get-out-the-vote efforts in college campuses in central and west Iowa, coordinated state-wide and local campaign events, and organized phone-banking events.

SELECTED PUBLICATIONS

Anna Rodriguez, *Domestic Violence: Trujillo, Trump and the Addition to Power*, 29 Berkeley La Raza L.J. 61 (2019).

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2017 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure David Oppenheimer	5.0	5.0	P
LAW	201	Torts Daniel Farber	5.0	5.0	P
LAW	202.1A	Legal Research and Writing Sarah Gur	2.0	2.0	CR
LAW	203	Property Holly Doremus	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2018 Spring

Course		Description	Units	Law Units	Grade
LAW	202.1B	Writ,Oral Advocacy **Units Count Toward Experiential Requirement** Sarah Gur	2.0	2.0	P
LAW	202F	Contracts Mark Gergen	5.0	5.0	P
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Ian Haney Lopez	4.0	4.0	H
LAW	224.6	Selected Topics Reprod Justice Jill Adams	1.0	1.0	CR
LAW	230	Criminal Law Avani Sood	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	32.0	32.0

2018 Fall

Course		Description	Units	Law Units	Grade
LAW	221.73	Wrtg Wrkp:Law, Ineq.& Soc. Chg **Fulfills Writing Requirement** Kathryn Abrams Ian Haney Lopez	3.0	3.0	HH
LAW	264.5	Comp Equal Anti-Dis David Oppenheimer	2.0	2.0	P
LAW	289	EBCLC Seminar Seema Patel Tirien Steinbach	2.0	2.0	CR
LAW	295.5Z	EBCLC Clinic **Fulfills Either Writing Requirement/Experiential** Seema Patel Tirien Steinbach	5.0	5.0	CR

	Units	Law Units
Term Totals	12.0	12.0
Cumulative Totals	44.0	44.0

2019 Spring

Course		Description	Units	Law Units	Grade
LAW	241	Evidence Avani Sood	4.0	4.0	P
LAW	281	Family Law Yvonne Lindgren	3.0	3.0	H
LAW	286T	Race & American Law Ian Haney Lopez	3.0	3.0	H
LAW	295	Civ Field Placement Ethics Sem **Fulfills Professional Responsibility Requirement** Marc Pilotin Susan Schechter	2.0	2.0	P
LAW	295.6A	Civil Field Placement **Units Count Toward Experiential Requirement** Susan Schechter	4.0	4.0	CR

Carol Rachwald, Registrar

Berkeley Law
University of California
Office of the Registrar

Anna Gabriela Rodriguez
Student ID: 3033078726
Admit Term: 2017 Fall

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	60.0	60.0

	Units	Law Units
Cumulative Totals	85.0	85.0

* Due to COVID-19, law school classes were graded credit/no pass in spring 2020.

2019 Fall

Course		Description	Units	Law Units	Grade
LAW	212	Critical Theory & Soc Sci Meth Osagie Obasogie	3.0	3.0	HH
LAW	223.1	Election Law Bertrall Ross	3.0	3.0	P
LAW	281.9	Reprodu Rts & Just **Fulfills 1 of 2 Writing Requirements** Khiara Bridges	2.0	2.0	P
LAW	282.1	Domestic Violence Law Seminar Nancy Lemon	3.0	3.0	P

	Units	Law Units
Term Totals	11.0	11.0
Cumulative Totals	71.0	71.0

2020 Spring

Course		Description	Units	Law Units	Grade
LAW	206C	Note Publishing Workshop Kenneth Bamberger Rebecca Wexler	1.0	1.0	CR
LAW	208	Advanced Legal Research **Units Count Toward Experiential Requirement** Michael Levy Kathleen Vanden Heuvel	3.0	3.0	CR
LAW	212.3	Critical Race Theory **Fulfills Writing Requirement** Russell Robinson	3.0	3.0	CR
LAW	220.9	First Amendment Sarah Song	3.0	3.0	CR
LAW	225.7	Topics Health Insur. Law&Reg Daniel Schwarcz	1.0	1.0	CR
LAW	286.5	Federal Indian Law Richard Davis	3.0	3.0	CR

	Units	Law Units
Term Totals	14.0	14.0

Carol Rachwald, Registrar

University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

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New College of Florida
Cumulative GPA: n/a

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Reading Poetry	Robert Zamsky		4	
Tutorial: Service Learning through Video Production - The Kobernick-Anchin Documentary Project	Maria Vesperi		4	
Independent Study Project: The Metaphysics of Gender and Race	Theodore Bach		4	
Sociology of Gender and the Body	Emily Fairchild		4	
Introduction to Environmental Studies	Jorge Ramirez		4	

Fall 2012 Service Learning through Video Production: The Kobernick-Anchin Documentary Project (80471) - Satisfactory
Division: Social Sciences
Type: Tutorial
Session: Full Term
Instructor: Maria Vesperi
Registration Status: Registered
Internal Narrative Evaluation
The content of this Internal Narrative Evaluation is a personal communication between the professor and the student. Only the student may provide this evaluation to external audiences. An Internal Narrative Evaluation is never included as a component of the official academic transcript.

The evaluation for this tutorial was submitted to me for review by the instructor, Nicholas Manting-Brewer.

Service-Learning through Video Production was a comprehensive tutorial that addressed the process of creating engaging documentaries, the ethics of interacting with human subjects and community outreach. The class learned about the experiences of residents at the Kobernick-Anchin Pavillion, a non-profit independent and assisted living facility for the elderly. While on site, the filmmaker-students explored topics that interested them about the facility and its residents.

The tutorial met regularly in the classroom for an hour and half per week to discuss relevant readings and to provide updates on the projects. As the semester progressed, students dedicated more time to volunteering at the Kobernick-Anchin facility. The class had assigned readings related to service-learning, filmmaking and anthropology. All students kept a field notebook. They were required to bring their notebooks to class on a bi-weekly schedule so that the instructor could review it.

I first encountered Anna Rodriguez as a shy student, but she immediately demonstrated an intuitive approach to her work. Her initial paper, in which she discussed the importance of service learning, demonstrated a sophisticated grasp of the importance of community outreach. Her weekly journal was incredibly detailed and organized, which was not surprising given her promptness in submitting assignments. Annaâ€™s work throughout the semester was exemplary. It was almost hard to believe that she is a first-year student due to her preparedness in handling a self-driven tutorial.

Throughout the semester, Anna participated in a book cart project, where she wheeled a mobile library through the facility and interacted with many residents. Mary Ann Gabriel, the volunteer coordinator at Kobernick-Anchin, specifically commented on how much she enjoyed Annaâ€™s presence throughout the semester and noted that Anna was having a truly positive impact through her work. In total, Anna volunteered for 18.5 hours.

Anna provided a very strong video that demonstrated her presence as a researcher, as well as a nice portrait of Ted Bleaker, a resident at Kobernick-Anchin. Her video portrayed Mr. Bleaker as a physically active and intellectually curious individual. Anna did a fantastic job of revealing her process as a researcher by including questions she asked Mr. Bleaker, in addition to his answers. She also did a very skillful job of condensing what was originally a lengthy interview to a concise 6-minute video that conveyed strong work.